Supreme Court, U.S.
FILED

98 520 JUL 21 1998

OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

October Term, 1998

Clara Palm
and as Surviving Parent
of Anthony Robert Palm, deceased

Petitioner (s)

v.

Las Vegas Metropolitan Police
Department , a political Sub-division
of Clark County,Clark County
a political subdivision of the state of Nevada,
and Merl Sage, and does I through v, inclusive

Respondent (s)

**On Petition For Writ Of Certiorari**
**United States Court of Appeals**
**for the ninth circuit**

## PETITION FOR WRIT OF CERTIORARI

**Clara Palm**
**4452 Newton Drive**
**Las Vegas, Nv 89121**
**702/456-4352**

## ISSUES PRESENTED FOR REVIEW

1. WHETHER ALL FACTS WERE GIVEN TO COURTS TO REVIEW IN ORDER TO COME TO A DECISION IN FAVOR OF DEPENDENTS.

2. WHETHER THERE WAS A SEXUAL ASSAULT BEATING AND ATTACK OF A POLICE OFFICER.

3.. WHETHER VIOLATIONS OF PROCEDURES WERE COMMENCED AT TIME OF INVESTIGATION.

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## PETITION FOR WRIT OF CERTIORARI

Clara Palm respectively petition for a Writ of Certiorari to review civil suit entered in The Federal Court in the state of Nevada, County of Clark, by the California Third District Court of Appeals.

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## STATEMENT OF JURISDICTION

Federal District Court State of Nevada denied dismissal on June 6, 1996. Federal District Court ruled in favor of defendant on April 15, 1996. Appeal for civil case filed through Ninth Court on May 9, 1997. Ninth Court ruled in favor of defendants on April 29, 1998.

## STATEMENT OF CASE

On March 21, 1995 off duty police officer Merl Sage of the Las Vegas Metro Police Department shot and killed Anthony Robert Palm in what was called an alleged rape, assault, and attack on a police officer.

The appellee case presented to the courts as a justifiable shooting, stating that the decedent lunged at the police officer.

## STATEMENT OF FACTS

The defendant presented to the court what was called a vicious and sadistic attack by the decedent. Records and documents will show questionable evidence presented to the courts by the defendant.

The victim was allegedly beaten about the head and face and also choked. Exhibit 1 - show no evidence of trauma to face, neck or head (emergency room photos).

The victim was allegedly raped. Exhibit 2 will show no semen or secretion obtained from victim. Claim of semen on underpants of decedent. Terry Cook, Criminalist stated, "The semen dejected in TIC 2 (underpantsa0 could have originated from the suspect."

The decedent allegedly lunged at police officer. Statements given by witnesses during voluntary statements taken gave no mention of lunging. Lunging was introduced by Detective D. Hatch during questioning of officer Sage.

Officer Sage stating he forgot or did not have time to identify himself as a police officer. He stated everyone knew him, this should not be acceptable by law. His appearance as a common citizen would not make a command for an assault to stop or obey his orders.

## Patricia Woodall, Victim

***Beating and Rape:**

"And then he was jut there grabbing and he wrestled me to the ground and beat my face and my head and just kept trying to choke me and beat my head. He had my pants off and he raped me and he beat my head and choked, and choked, and choked and , uh; un got it."

Beating of head and face should have had substantial injuries.

Q: "Did he actually penetrate you?"

A: "Yes, he did."

If in fact penetration was made, questionable semen found on underwear of decedent not found on victim or any other fluids.

****Lunging:**

"And uh and out of the corner of my eyes I saw – I saw some movement, but I can't – I saw some movement, okay, and then he fired twice and the guy fell to the ground."

No lunging, seeing some movement did not describe the movement of the decedent.

## Billy Mizell

****Lunging:**

"He didn't lunge qt him, but he was moving towards him , and the policeman fired twice and they guy fell down never moved again." (page 2)

***Beating and Rape:**

Q: "Okay, by chance did you happen to see the suspect striking the victim on the ground?" (page 4)

A: "No, I never saw that. That's why as I watched all I could see was like uh, him trying to keep her from getting up."

"I never saw any blows" (page 38)

Lunging: Seemed to move at the policeman

## Carol Jean Ewing

***Rape:**

"They were arguing and then the black man took his pants down and she pulled hers down and they began having sex."

***Beating:**

Q: Did you see anybody hitting each other or slapping each other or anything like that?" (page 3)

A: "No, at the time I was watching them, I didn't see anybody hitting anybody.

## Janice Cubim

***Beating:**

"And I saw him punch her three or four times on the head around the face."

No trauma and signs.

## Margaret Rose Sage

***Beating and Rape:**

"At one point you could literally see he was choking her." (page 2)

"She had a lot of bruises around her neck."

"I said, Merl, I think he's raping her.

****Lunging:**

"

He started to pull up his pants and then he took two steps forward right at Merl and Merl shot him twice." (page 3)

## Merle Sage

****Lunging:**

"He pulled them straight up and at the same time again took un three, four step towards me at uh which time I shot him twice.

A: "Uh, yes it was. He, as he when he got up, he pulled his pants up at the same time and then one, the same movement or the same motion, pulling his pants up at the same time and moving towards me."

Was lunging implanted by Detective D. Hatch, does not match football tackle position.

Q: "Okay, when he was coming toward you, was it in a real rapid movement, all one movement, coming up pulling the pants on, then lunging at ya?"

***Beating and Rape:**

"No, there's no doubt in my mind whatsoever. I knew that this lady was in trouble and by her screams and watching him beating on her and the sexual assault at the same time, I knew I had to do something; I felt truly that her life was in danger.

**Distance:**Q: "Okay, so it would indicate that he was within five to ten feet of you when you shot him.

*/** Footnotes

Voluntary Excerpts from voluntary statements made 3/21/95

## INVESTIGATIVE PROCEDURES

There are questionable investigative procedures followed by the Las Vegas Police Department the morning of March 21, 1995. Defendant's counsel needs to justify as to why the following procedures were conducted.:

1. Evidentiary items removed prior to coroner' arrival to the scene of the crime (page 2-3 Coroner's Investigative Report). "All of the evidentiary items found on the grass lawn were recovered prior to my arrival. LVMPD I. D. Specialist pointed out where impounded items were recovered from".
2. Autopsy and blood test performed prior to family being notified and body being identified.

   Page 1 Coroner Autopsy Report. Autopsy performed by

   G. Sheldon Green. MD. Chief

   Medical, Examiner at 1206 hours. Blood work collected 12:30 p.m.
3. Body identified by fingerprints by Kelly Morris (CCME) 14:30. Family not notified until 13:10 and refusal made by Coroner' office to let family ID body.
4. By ID of license plate at 7:00 a.m., decedent's name and address was known to be two blocks from shooting.
5. Witnesses to state victim at inquest was not victim at crime scene.

CLARK COUNTY CORONER
MEDICAL EXAMINER
1704 Pinto LANE
LAS VEGAS, NEVADA

NAME PALM, ANTHONY ROBERT AGE 21
DATE 03/21/95 CASE # CASE #95-01084

Today, 03/21/95 at approximately 0840 hours, I responded to a report of a death at the 4400 block of Dennis Way, Las Vegas, Nevada as requested by Mary (P# 517) of the LasVegasMetropolitanPolice Department (LVMPD) Dispatch. The death was reported as the result of an officer involved shooting Upon arrival at approximately 0905 hours. I was met by Sgt. K.Manning, LVMPD, who related the following information. Earlier this morning at approximately 0558hours,the Decedent reportedly was physically battering and sexual assaulting a young female on the front grassy lawn at the residential street corner lot of 4437 Dennis Way. Directly across the street to the west of the incident scene, an off-duty LVMPD Police Officer looked out his bedroom window and observed the assault in progress. The officer telephoned 911 and turned the phone over to his wife.The officer proceeded from his residence and approached the decedent.Sgt. Manning continued by relating the following course of events.

The officer witnessed the decedent on top of the female, and was sexually assaulting her. The officer verbally confronted the decedent. The decedent reportedly stood up and pulled up his pants. The decedent reportedly was deranged. Suddenly, the decedent lunged towards the officer. The officer subsequently discharged his seem-automatic .40 caliber handgun twice, striking the decedent. The decedent collapsed onto the sidewalk to his current position. The decedent had no vital signs. Medical assistance arrived. No aid was rendered to the decedent but the assaulted female victim was transported to the University

Medical Center.At the time of obtaining the preceding information thefemale'sidentity and medical condition was not available.Upon being led to the decedent at approximately 0910 hours, I reviewed the incident scene. The decedent's body was lying supine on the sidewalk and covered by a white sheet. To the right (NORTH) of the body, there was a parked tan-colored vehicle, a ChryslerLeBaron with Nevada license plate # CLH492.

All of the evidentiary items found on the grass lawn were recovered prior to my arrival. LVMPD ID Specialist Cabrales pointed out

Where the impounded items were recovered from

The female's clothing was reportedly laying approximately 10 feet in a southwest direction from the decedent. Two expended .40 caliber casings were reportedly recovered approximately 20 feet southwest from the decedent. Polaroid photographs are attached

Upon removing the sheet,I viewed a Negro male lying supine on the sidewalk. The decedent was fully clothed with his arms and legs sprawled. I observed what appeared
to be blood on the decedent's shirt around the upper right chest area. There were two areas of perforation discovered on the clothing that appeared to be bullet holes. One was noted on the upper chest area of the both the sweatshirt and tanktop t-shirt. To other hole was noted on the jacket's top right shoulder area near the collar and on the sweatshirt. There were obvious lawn stains with pieces of grass viewed on the front lower leg areas of the sweatpants, along with spots of what appeared to be blood. In lifting up the decedent's shirt for examination purposes, there were several bone-like fragmentsdscovered lying on the decedent's right upper chest area and covered in what appeared to be blood.Around the groin area under the decedent's boxer shorts, several pieces of grass were discovered.While examining the decedent, no apparent life signs were discovered The body was warm to the sense of touch. There was no presence of rigor mortis and no lividity was

noted. There was a healed scarred area of a anoticeable size noted on the forehead. I detected what appeared to be two gunshot wounds; onewound was located on the upper mid-chest area and the other wound was on the top right clavicle area. There was a small skin abrasion found on the inner left wrist area.On the decedent's hands, there appeared to be smeared blood on both of the palms and inner parts of the fingers. LVMPD ID Specialist bagged both of the decedent's hands for evidential purposes There was a brown-colored wallet discovered in the front left chest pocket of the jacket. The wallet was removed to aid inidentification of the decedent His Nevada driver's license was removed and place back into his pocket.

OFFICE OF THE CORONER MEDICAL EXAMINER, CLARK COUNTY, NEVADA
1704 Pinto Lane, Las Vegas, Nevada 89106

case#95-01084
Decedent Palm, Anthony Robert AKA
Status S DOB 4-15-73
Residence Address 4452 Newton Fr., Las Vegas Nv. 89121 SS #/ 315-92-4127 Height 69.00
Tel. No. (702) 456-4352 Desc: Sex M Race N Age 21
Weight 145.00 Hair Black Eyes Brown

Scars/Tattoos & Other Identifying features
Scaring on the forehead:
Mustache and Goatee.

Rigor Mortis None Liver Mortis None
Clothing Green Plaid Jacket: Gray Yank Top & Sweatpants: White Swatshirt & Socks:
Drugs & Medications None Striped Boxer Shorts: And Black Athletic Shoes

Occupation None Employed by Unemployed
Agency Reporting Lvmpd Date & Time Reported 03/21/95 08:40
Location of body Sidewalk Area at 4437 Dennis Wy.. Las Vegas, Nv. 89121
Type of Death V At Work: N

| Circumstance | Date | Time |
|---|---|---|
| Reported to Agency by | 3-21-95 | 06:01 |
| Name & Address | Off-Duty LVMPD Officer | |
| Last Seen Alive by | 032195 | 05:58 |
| Name & Address | Off-Duty LVMPD Officer | |
| Found Dead by | 032195 | 06:01 |
| Name & Address | Off-Duty LVMPD Officer | |
| Pronounce Dead by | 032195 | 09:15 |
| Name & Address | William Gazza, CCME | |
| Body Viewed by | 032195 | 09:15 |
| Name & Address | William Gazza, CCCME | |
| Identified by | 032195 | 14:30 |
| Name & Address | fingerprints, Kelly Morris (CCME) | |

Witnesses The Decedent's Victim, OffDuty Officer and Four Residential Witnessed

Law Enforcement Agency LVMP

officers Det. Keeton, Det. Hatch, Det Mikolaninis, Sgt. Manning, Sgt. Hefner, I>D> Cabrales, Ford and McLaughlin
Property Receipt # 45076
In Custody of Prop. Left @ Decedent (seal #871554) ( #45303 @ CCCME)
Custody of Body: Removed by Bunker to CCME
Driver Chris Barnum
Assisted by Mike Shadler
Requested by As Per Rotation

10

Death Notification Next of Kin Clara Palm
Relationship MotherAddress 4452 Newton Dr., Las Vegas, Nv. 89121 Tel No. (702) 456-4352Other #1
John Palm Relationship BrotherAddress 4452 Newton Dr. , Las Vegas, Nv 89121 Tel No. (702) 456-4352

Contacted C. Palm In Person at her Residence
Notification made by William Gazza, CCME Date 03-21-95 time 13:10

Pancreas: The pancreas is of normal size and configuration. Cut surfaces show normal gray-tan lobular architecture.

Organs of the neck: The anterior strap muscles are intact and normal. there is no hemorrhage.The thyroid gland is of normal esophagus and hypopharynx are intact and appear normal. The upper trachea, larynx, epiglottis, and hyoid bone are intact. The tongue appears normal.

Head: The scalp is reflected in the usual coronal fashion. There are no gross abnormalities of scalp or skull. There is on epidural, subdural, or subarachnoid hemorrhage. The configuration of the brain is normal. It neighs 1520 grams. Serial cut surfaces if the cerebrum in the coronal plane show no hemorrhages, tumors or other visible abnormalities. The internal cerebra; architecture is normal. External and cut surfaces of the brain stem and cerebellum are intact and normal. The cervical sine id intact.

Path of the Missiles: One bullet struck the right anterior chest at a point 5 inches below the suprasternal notch and 2 inches to the right of the midline: passing from right toward left, slightly from front-toward back, and downward in a head-to-toe direction. It destroyed the fourth costal cartilage, perforated the pericardial sac. destroyed major portions of the heart. passed through the lower lobe of the left lung, and was recovered from the left chest wall approximately in the eight intercostal space.

The bullet which struck the posterior superior aspect of the back of the shoulder passed downward in head-toward-toe direction and right-toward-left. It entered the right hemithorax through the second intercostal space, perforated the right hemithorax through the second intercostal space, perforated the right lung, passed through the spine at the T-7 level. this wound involved the vertebral body but apparently did not involve the spinal cord. The bullet then perforated the stomach and the spleen, and was recovered adjacent the the splenic bed.

Both bullets proved to be .40 caliber "Silvertip" projectiles with prominent mushroom-type deformity. That are cleaned and delivered to the hand of Officer Ford at the time of recovery.

Foot note excerpts from Coroner's report 3-21-95

| LVMPD REPORT | CRIMINALIST- Terry Cook | P#245 | CASE#950321-0282 | | | | |
|---|---|---|---|---|---|---|---|
| EVIDENCE | ANALYZED | SEROLOGICAL GROUPINGS | | | | | |
| | BOOKED BY | EVIDENCE | ABO | SCRETOR | SEMEN | EsD | PGM st | |
| | pkg. item | DESCRIPTION | | ANTIGENS | FACTORS | | | |
| TLC 1 | EBBERT | vaginal/woodall | | | neg | | | |
| | SAK 1 | | | | | | | |
| | EBBERT | rectal/Woodall | | | neg | | | |
| | SAK 2 | | | | | | | |
| | EBBERT | Oral/Woodall | blood | | neg | | | |
| | SAK 3 | | indicated | | | | | |
| | EBBERT | secretions/WOODALL | blood | | NEG | | | |
| | SAK 4 | | indicated | | | | | |
| | EBBERT | combed | | | | | | see conclusion |
| | SAK 5 | pubic/Woodall | | | | | | see conclusion |
| | EBBERT | debris/Woodall | | | | | | see conclusion |
| | SAK 6 | | | | | | | |
| | EBBERT | whole blood/Woodall | A | | | | | |
| | SAK 7 | | | | | | | |
| | EBBERT | saliva stain/Woodall | | A & H | | | | |
| | SAK 8 | | | | | | | |
| TLC 2 | FORD | whole blood/ Palm | O | lea-b+ | | | 2+1 | |
| | ME kit 1 | | | (secretor) | | | | |
| | FORD | underpants/palm | | H | pos | | 2+1 | |
| | MEkit 2 | | | | | | | |
| | FORD | penile/Palm | | H | pos | | NR | |
| | MEkit 3 | | | | | | | |
| | FORD | debris/Palm | | | | | | see conclusion |
| | ME kit 4 | | | | | | | |
| | FORD | combed pubic/Palm | | | | | | see conclusion |
| | ME kit 5 | | | | | | | |
| | FORD | public standard/Palm | | | | | | |
| | ME kit 6 | | | | | | | |
| | FORD | head hair standard | | | | | | |
| | ME kit 7 | Palm | | | | | | |

R. Paul McCauley, Ph. D.
Criminologist
4620 Lucerne Road
Indiana, Pennsylvania

February 12, 1997

Mr. Thomas Christensen
Attorney at Law
1000 S. Valley View Blvd.
Las Vegas, Nv. 89107

Re: Clare Palm vs. Las Vegas Metropolitan Police Department, et al.

Dear Mr. Christensen:

Please accept this letter as my report for the above-referenced case. I reserve the right to amend this report should additional information become available.

EXPERT QUALIFICATIONS

I am a professor of Criminology and former chairperson or the Department of Criminology, Indiana University of Pennsylvania (IUP). The university is a comprehensive, doctoral degree granting institution with an approximate enrollment of 15,000 students. The Department of Criminology offers bachelors, masters and doctorate degrees and has about 1,000 criminology majors. I teach and conduct research at all academic/degree levels.

I am a former Pennsylvania municipal police officer and in that capacity I engaged in high speed pursuits and police vehicular approaches and maneuvers. I am certified by the Pennsylvania State Police as a police Instructor. In my academic duties, as we;; as in my police operations and pursuits. Also , I have written or published more than 80 professional papers, books, chapters and technical reports many of which

address the issues concerning police pursuits, operations and policies.

For almost ten years I was a member of the faculty of the Southern Police institute, School of Police Administration, University of Louisville, In that position I lectured to more than 1,500 police commanders from around the United States, including state and municipal command officers, in the area of police operational policy formulation, which included police pursuits and use of force. More than 300 of these student officers have become police Chiefs. Also, I have received numerous letters and commendations from police executives, for my work and contributions to their agencies.

In 1987, I was a Fulbright Scholar, Australia. My lectures included university faculties in the schools of law, justice studies, business and to professional police commanders and security directors. My lecture area was the relationship/interaction between public police and private security in the prevention of crime.

I am a Board Certified Forensic Examiner and Diplomat, American College of Forensic Examiners and have been qualified as a police expert in state and federal courts in more than 20 states. In 1984, I was one of two finalists interviewed for the position of Commissioner of the Pennsylvania State Police. The Pennsylvania State House of Representatives issued a formal citation recognizing my career and contributions to law enforcement. A copy of my curricula vitae and list of previous cases, in which I have testified, are attached.

I have received a retainer in the amount of $1.500.00, to which I charge at the hourly rate of $125.00. Deposition and trial testimony are billed at $150.00 per hour, with a five hour minimum, plus expense portal to portal.

INTRODUCTION

I was retained by Attorney Thomas Christensen, to review the case material and render a professional opinion regarding the police operation which occurred on March 21, 1995, involving the above referenced parties. My retainer was paid in advance of my rendering any analysis or opinion and payment was not contingent upon my rendering a favorable opinion.

MATERIALS REVIEWED

For the preparation of this report, I have reviewed the following material. (Not listed in any order of importance.)

1. Copies of two police dispatch tapes regarding night or this incident.

2. Laser printed photocopies of all photographs pertaining to this case.

3. Defendants Las Vegas Metropolitan Police Department, Clark County, and Merl Sages' Federal Rules of Civi, l Procedure 26(f) production.

4. Plaintiff complaint.

5 Answer to Complaint.

6. Plaintiff Interrogatories.

7. Plaintiff's initial document and witness exchange at 26 (f) meeting.

8. Plaintiff's interrogatories to Defendant.

9. Plaintiff Clara Palm's Answers to Interrogatories.

10. Amended Complaint.

11. Motion to Dismiss

12. Plaintiff's Opposition to Motion to Dismiss

13. Las Vegas Metropolitan Police Department's Response to Request to Produce.

14. Las Vegas Metropolitan Police Department's Answers to Plaintiff's interrogatories.

15. Reply to the opposition to the Motion to Dismiss.

16. Copy of Las Vegas Metropolitan Police Department's Response to Second Request for Admission.

17. Copy of Las Vegas Metropolitan Police Department's Response to Second Request to Produce.

18.. Copy of Las Vegas Metropolitan Police Department's Answers to Plaintiff's Second Set of Interrogatories.

19. Merl Sage's Answer to Plaintiff's Interrogatories.

20. Motion to Compel.

OPINIONS AND RELEVANT COMMENTS

I offer the following opinions within a reason able degree of professional certainty, I reserve the right to amend this report as additional information is made available to me.

1. You asked if off-duty officer Merl Sage and/or the Las Vegas Metropolitan Police Department )lvmpd) violated accepted police practices in responding to this felony in progess. My first answer regarding Officer Sage is yes. Accepted police practices would require Officer Sage to escalate force in response to Palm's resistance. The use of force continuum escalates from (a) officer presence, (b) verbal commands, (c) Physical control/restraint, (d) chemical agents, (e) incapacitation, and (f) deadly force. When Officer Sage, off-duty and not in uniform, arrived at the scene he should have made his POLICE PRESENCE known by identifying himself as a police officer. This identification is done by verbally saying *police" and showing a badge or sign of authority., Officer Sage did not identify himself a a police officer and his subsequent commands to Palm were without authority, meaning Palm did not know that Officer Sage was issuing lawful commands as a police officer.

Las Vegas Metropolitan Police Department Use of Force policy states, "department members shall, whenever feasible, identify themselves and state their intention to shoot." It is my opinion that it was feasible for Officer Sage to verbally identify himself as police officer the moment he arrived at the scene. His first command should have be prefaced with "Police..." By identifying himself as a

Officer Sage would have sent a message to Palm that he (Sage) was a trained police officer and not just a citizen, Knowledge that Sage was police officer, would have been a significant fact in Palm's decision to compel with Sage's commands.

Likewise, it was feasible for Officer Sage, a trained police officer, to inform Palm that he was a police officer and that he would shoot. When Officer Sage arrived at the scene, it was feasible for him to say, for example, "Police, Stop." These two words identify the officer and command Palm to do somethingstop. Failure to stop or any threatening action from Palm should have been met with "Stop or I'll shoot." When the officer is at safe such commands. safely. If Officer Safe was nit at a safe distance and lost his tactical advantage, then the shooting emergency was created, in part, by the officer.

In my opinion Officer Sage violated LVMPD use of force policy and accepted police practices.

2. To answer the second part of your questions, regarding the LVMPD, I refer to police training, as I mentioned above, and supervision and discipline. The fact that the LVMPD had a use if force policy to guide Officer Sages' conduct is of no consequence if he was not trained in this policy. The failure of the LVMPD to train Officer Safe, in this policy, would violate accepted police practices.

Likewise, if LVMPD officer knew other officers did nit follow LVMPD policies and the LVMPD did not discipline/investigate them for these violations, LVMPD's failure would violate accepted police practices.

3. Looking at the shooting incident as a "snapshot in time," the shooting sequence/order need to be determined. Palm was shot twice. One entry wound was to the front if his body. A second entry wound was to the side/shoulder area and at a downward angel. If the frontal shot was the first shot in the officer's firing sequence, it wound appear that Palm was facing the officer and would tend to support the officer's statement that Palm was approaching him. Even , in such a situation, the officer may not have been justified in shooting an approaching Palm and that force may have been excessive under the circumstances.

If the side/shoulder shot was the first shot in the officer's firing sequence, it should appear that Palm was nit facing or approaching the officer but bent over and turning away. In such a situation the officer would not have been justified in shooting a non-threatening Palm and that force would have been excessive under the circumstances.

4. The failure of the LVMPD to produce polices, procedures, and training in the use of force; off-duty police officer operations. duties and responsibilities; officer self identification; and other information identified in the Motion to compel, which i requested, makes it impossible for me to determine what the written policies were in the LVMPD and their degree of conformity to accepted police practices. I am unable to determine the practices of the LVMPD and assess how/if the practices and customs of the LVMPD differ from their written policies and accepted police practices.

Indeed, the failure of the LVMPD to produce these essential and commonly produced documents, in such litigation, suggests that they may not have them, If the LVMPD does not have such documents, that would be contrary to accepted police practices.

The International Association of Chiefs of Police (IACP) Training Key #229 The Disciplinary Process: Internal Affairs Role, Vol. XIII, p. 61 states:

Perhaps the most exacting aspect of the police discipline process is the investigation of an allegation of misconduct.... The investigation must be seen by both the community and the police as being impartial and diligent.....

Confidence and trust in police integrity can be instilled in the public only through objective investigations.... A stable, uniform, and totally unimpeachable system if investigating complaints against any of the department's employees reinforces proper police conduct as well as assures the public of effective and honest police services.

The LVMPD's failure to provide internal affairs/police misconduct information, under these circumstance, reflects a system hiding behind the "blue veil" of police secrecy. If the LVMPD is not to engage in any activities necessary to "police the-police." Clearly, the community cannot see such a police system as being trustworthy, impartial diligent, and totally unimpeachable. The consequences can be devastating for the LVMPD and for the Community it serves or fails to serve, as the case may be.

Sincerely,

R. Paul McCauley, Ph.D. Bcfe

Enclosures: (2)

## SUMMARY

This is not a Black and White case but a wrong done by the men in color. This was a young man killed and not allowed to defend himself in the court of law. Question of training and procedures of the Las Vegas Police Department need to be asked.

All of the evidence presented in the case is from actual statements of witnesses and actions taken by the Las Vegas Police department. The actions taken by Officer Merl Sage and the Las Vegas Police Department could no way be justified. If their actions are accepted ,the City of Las Vegas can not be safe with a force setting their on rules and allowing police officers to shoot at will.

For the wrongful death of Anthony Robert Palm , the plaintiff is seeking punitive damages against Officer Merle Sage and the Las Vegas Police Department.

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## CONCLUSION

Clara Palm
4452 Newton Drive
Las Vegas, NV

# APPENDIX

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Appendix A

UNITED STATES COURT
DISTRICT OF NEVADA

ENTERED AND SERVED APR 15 1997

CLARA PALM,

Casw No. CV-S-95-1283LDG(R

Plaintiff

vs. JUDGMENT

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, et al.,

Defendants.

---

Defendants Las Vegas Metropolitan Police Department, Clark County, and Officer Merl Sage having moved for summary judgment (#21), and the Court having duly considered and determined the issues in favor of Defendants,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is granted in favor of Defendants and that Plaintiff takes nothing by way of this action.

DATED this_12_ day of April, 1997.

---

Lloyd D. George
Chief United States District Judge

Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ENTERED AND SERVED APR 15 1997

Case No. CV-S-95-1283-ldg (RJJ)
ORDER

CLARA PALM,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, et al.,

Defendants.

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DefendantsLasVegasMetropolitanPoliceDepartment (LVMPD), Clark County, and Officer Merl Sage move to dismiss and move for summary judgment (#21). Plaintiff Clara Palm opposes the motion (#23).

At about 6:00 a.m., on the morning of March 21, 1995, Anthony Palm, the Plaintiff's son, attacked and violently raped Patricia Woodall. Witnessing the rape from his home, Merl Sage, an off-duty police officer, called 911, pulled on a pair of jeans, picked up his duty firearm, and ran to the assistance of Woodall. When he approached the scene of the ongoing rape, Sage pointed his weapon at Anthony and ordered him to get off and to back away. Anthony looked at Sage, got off Woodall and pulled up his pants. Anthony did not move away, however, but quickly moved toward Sage.

Sage then shot Anthony twice. Palm.

brought this suit alleging Sage used unconstitutional force on her son and that Sage had engaged in a conspiracy to deprive her son of his rights.

MOTION TO DISMISS

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the non-moving party. Russell v. Landrieu, 621 F. 2d 1037 (9th Cir. 1980). A dismissal under Fed. R. Civ. P. 12(b) (6) is essentially a ruling on a question of law. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578 (9th Cir. 1983). For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. Halet v. Wend Inv. Co., 672 F. 2d 1305 (9th Cir, 1982). Although allegations of a pro se complaint are held to less stringent standards than formal pleadings drafted lawyers, Haines v. Kerner, 404 U.S. 519 (1972) (per curiam), sweeping conclusory allegations do not suffice, Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

CLARK COUNTY

Clark County asserts that it must be dismissed since, as a matter of law, it cannot be held liable for actions or policies of the LVMPD.

To establish the liability of a governmental entity under S 1983, a plaintiff must show the entity itself was a moving force behind the constitutional violation.

[T]hus, in an official- capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." id.
The LVMPD is a separate municipal entity that can both sue andbe sued in its own name. Nev. Rev. Stat. 280.280. Clark County's only involvement with the
police department is through the police commission, which is composed of the Sheriff and various representative of both Las Vegas and Clark County. Nev. Rev. Stat. 280.130 Nevada has already determined, by statute, that the police commission's function is to supervise the

budget of LVMPD. Nev.Rev. Stat. 280. 190-270. As the police commission, and thus Clark County, has no other function related to the LVMPD and does not establish LVMPD's policies, neither can be held liable for the action or policies of the LVMPD. Bruttomesso v. Las Vegas M etro. Police D ept., 95 Nev. 151 (1979).

Palm responds that Clark County was commissioned as a body with an elected Sheriff to control and maintain the law enforcement..." Her argument ignores that, in 1974, Nevada created the LVMPD as a separate municipal entity to provide law enforcement and that Nevada further provided that the LVMPD could be sued in its own name. As noted in Bruttomesso, the function of the police commission, and thus of the County, is budgetary supervision. Accordingly, dismissal of Clark County is appropriate as a matter of law.

PUNITIVE DAMAGES

The LVMPD argues that any claim for punitive damages must be dismissed as to LVMPD since it is a municipal entity and municipalities are immune from punitive damages under the Civil Right Act of 1871 and 42 U.S.C. S 1983. Newport v. Fact Concerts, Inc.,473 U. S. 247 (1981). Palm cites Nev. Rev. Stat. 41. 032 for the proposition that LVMPD's immunity does not apply if "due care" was not used, and due care is a disputed issue.

Section 41.032 is irrelevant to whether the LVMPD may be held liable for punitive damages. That section addresses only whether the LVMPD is immune from suit when due care has been used. The appropriate statute is S41.035, in which Nevada has unambiguously stated that "[a]n award may not include any amount as exemplary or punitive damages." As Nevada has not waived punitive damages liability for its municipal entities, Palm's claim for punitive must be dismissed as to the LVMPD.

Palm's S 1985 (3) Claim

In her second cause of action, Palm alleges that Sage violated S 1985 (3),"acting in concert and under color of law, actually conspired to deprive Citizens, such as Anthony, of his constitutionally protected rights. Defendants assert that this claim must be dismissed as

## Appendix A

Palm has not identified any other person with whom Sage acted in concert or conspired. Palm has failed to offer any argument in opposition. Her failure to address this issue constitutes her consent that her second cause of action must be dismissed. LR 7-2 (d). Moreover, the court agrees that Palm has not identified any person or entity with whom she alleges Sage conspired. As Sage could not conspire with himself, her second cause of action pursuant to S 1985 (3) must be dismissed.

MOTION FOR SUMMARY JUDGMENT

Defendants assert that they are entitled to summary judgment on Plaintiff's remaining claims since, as a matter of law, Sage's actions did not constitute an unconstitutional use of force. In considering a motion for summary judgment, the court performs "the threshold inquiry of determining whether there is the need for a trail---whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,250 (1986). To succeed on a motion for summary judgment, the moving party must show (1) the lack of a genuine issue of any material fact, and (2) that the court may grant judgment as a matter of law. Fed. R. Civ. Pro. 56 (c); Celotex Corp. v.Catrett, 477 U. S. 317, 322 (1986).

A material fact is one required to prove a basic element of a claim. Anderson, 477 U. S. 477.at 248. The failure to show a fact essential to one element, however, "necessarily renders all other facts immaterial" Celotex, 477 U.S. at 323.

"[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. "Of course, a party seeking summary judgment always bear the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any. which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. As such, when the non-moving party bears the initial burden of proving, at trial, the claim or defense that the motion for summary judgment places in issue, the moving party can meet its initial burden on summary judgment "by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. Conversely, when the burden of proof at trial rest on the party moving for summary judgment, then in moving for summary judgment the party must establish each element of its case.

Once the moving party meets its initial burden on summary judgment, the non-moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro. 56(e). AS summary judgment allows a court "to isolate and dispose of factually unsupported claims or defenses," Celotex, 477 U.S. at 323-24, the court construes the evidence before it "in the light most favorable to the opposing party." Adickes v. S. H. Kress & Co., 398 U. S. 144,157 (1970). The allegations or denials of a pleading, however, will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U. S. 574, 586-87 (1986).

Palm suggests that, on the morning of March 21, 1995, her son and Patricia Woodall "were having some kind of an altercation on a front lawn." This curt summary is an extreme understatement of the events preceding her son's death, and is

achieved only through an extremely liberal, if not deceptive, use of the evidence. Palm implies the "altercation" was some type of consensual activity, citing Woodall's statement that she told Anthony to "just act like your my boyfriend, I won't let them take you.' The context of Woodall's entire statement and of complete record , however, demonstrates that this statement was not of consent, but was nothing less than Woodall's attempt to save her own life.

Appendix A

Having reviewed the entire record and all statements as a whole, rather than snippets taken out of any relevant context as Palm has done, shows that Woodall was taking a walk. Anthony followed her for some time in his vehicle and ignored her request to be left alone. At some point, Anthony left his vehicle, crossed to where Woodall was walking and attacked her, grabbing her by the neck and slamming her to the ground. He then kept shoving her head to the ground, punching her in the head and about her face continuously. To witnesses, it initially appeared as if two boys were having a fight. Although Woodall screamed and fought back as best she could, her efforts merely caused Anthony to inflict even greater force, grabbing her by the throat "like he was trying to rip my throat out." As recited by Woodall:

I'm please let me breathe, you gotta let me breathe and I thought I was going, that was, I was blacking out. I, I could fell the stage come out of blackout and I knew if I kept going that he would as keep going. The man wanted to kill me. He had, it was weird,--------something but he wanted to kill me. And while I was looking, all this happened in a matter of seconds -------, and as I had my head sideways trying to do this, I seen this house that was across the street right where his car was parked as a matter of fact. Above it was a two story a with window pane with no curtains there and the light was shining on him to where, um, you couldn't see inside of it and I said somebody's watching us and he looked up sideways and I said just act like your my boyfriend, I won't let them take you I thought maybe he would loosen up enough to where with his hand on my throat so I could breath and get my arms moving again or something

As can be seen when viewed in its proper context, Woodall was not suggesting she onsented to Anthony's conduct when she suggested he act like her boyfriend. Rather, the statement was a tactic inspired by the Anthony's prior violence that caused her to believe he would soon kill her. The statement was not a consent to being raped, but a ploy to save her life, to breathe again, Palm also cites the statement of one witness, Carol Ewing, that Woodall pulled her pants down A review of Ewing's entire statement shows, however, that not only did she recognize that Woodall was not a willing participant, but she admits that she never witnessed how Woodall's pants were pulled down.

Appendix A

Having reviewed the record, and the lack of any evidence by Palm to the contrary, the court finds it undisputed that, on the morning of March 21 1995, Anthony rapeWoodall. He subjected her to sexual penetration against her will, using physical violence to render Woodall physically incapable of resisting. The minor variations of the witnesses' statements do not create an issue of fact whether decedent raped Woodall

. It is also undisputed that, upon witnessing the rape, Sage called 911, gave the phone to his wife, put on his Jeans, picked up his gun, and ran to the scene of the rape. He then ordered Anthony to get off Woodall and to back away. Anthony got off Woodall, and pulled up his pants.

Although Palm contends that an issue of material fact remains whether Anthony next took a "non-threatening" action, she does not offer any evidence to support her hypothesis. Rather, she offers only the hypothesis of her expert that it was possible that Sage's first shot hit her son in the side/shoulder and if his second shot hit her son in the chest, her son may not have been "facing or approaching the officer but bent over and turning away.

Notably, a review of the entire statement of Palm's expert indicates that he concedes that it was also possible Anthony was facing Sage and, if so "the officer may have been justified in shooting" Anthony. In addition, the expect does not preclude the possibility that even if Sage's first shot was to Anthony"s side/shoulder, her son was facing and approaching Sage. A

review of the record indicates that every person who witnessed the shooting saw Anthony move toward Sage, Sage testified that Anthony, after getting off Woodall and pulling his pants up, came toward him quickly, lunging at him. Sage's wife also testified that Anthony lunged at her husband after getting of Woodall. Ewing testified that Anthony moved quite quickly towards Sage without ever stopping. Another witness, Billy Mizel, also saw Anthony immediately move towards Sage after getting of Woodall. * Palm has not offered any

---

* The court rejects Palm"s suggestion that an issue of fact exists because the witnesses differ whether Anthony "lunged" or merely moved quickly toward Sage. None of

evidence disputing that each of the witnesses saw her son face and quickly approach Sage after Sage had ordered him to quit raping Woodall.

Upon this record, the court readily finds that Sage did not use unconstitutional force. Sage witnesses and intervened in Anthony's savage and violent rape of Woodall, a rape Woodall believed she would not survive. When ordered to stop the sexual assault and to back away from the victim, Anthony instead rose from Woodall, pulled up his pants, and then moved quickly and directly toward Sage. Under these circumstances, Sage's use of force to stop Anthony was not unconstitutional.

Therefore, for good cause shown,

THE COURT ORDERS that Defendant's Motion to Dismiss and Motion for Summary judgment (#21) is Granted. Clark County is DISMISSED with prejudice. Plaintiff's Second Cause of Action pursuant to 42 U.S.C.s1985(3) is DISMISSED with prejudice. Plaintiff's claim for punitive damages against the Las Vegas Metropolitan Police Department is DISMISSED with prejudice. Summary judgment is GRANTED in favor of Defendants as to all of Plaintiff's claims.

DATED this 12 day of April, 1997

Lloyd D. George
Chief United States District Judge

---

the witnessed dispute that, after decedent was ordered to stop raping woodall and to back off he instead moved quickly toward Sage.

Exhibit I

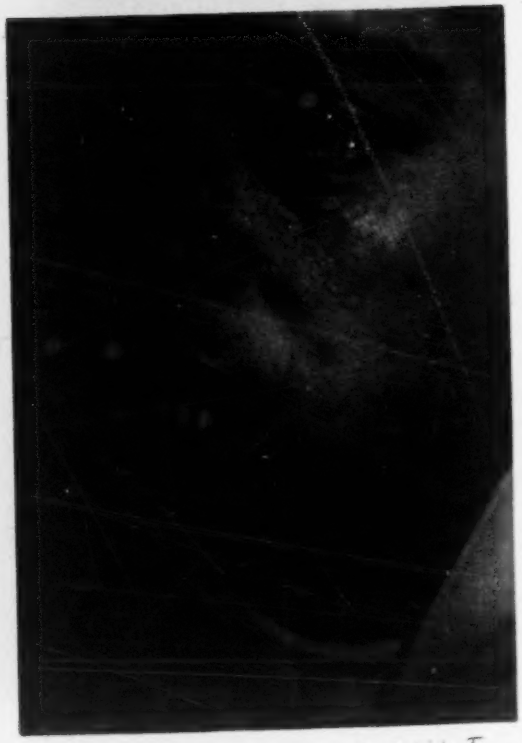



Exhibit I

Exhibit III

Exh. b.t

Appendix B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 97-15896

D.C No. CV95-01283-LDG

CLARA PALM, individually and as surviving parent of Anthony Robert Palm. deceased.

Plaintiff-Appellant

vs.

*MEMORANDUM

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; CLARK COUNTY; MERL SAGE

Defendants-Appellees.

Appeal from the United States District Court

for the District of Nevada

Lloyd D. George, Senior District Judge, Presiding

Submitted** March 17, 1998

Before: CHOY, SNEED, WIGGINS, Circuit Judges.

Clara Palm appeals the district court's order dismissing certain defendants and claims and granting the defendants' motion for summary judgment in her civil right action against defendants Clark County ("County"), the Las egas Metropolitan Police

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.** The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34 (a) and 9th Cir. R.

Appendix B

Department ("LVMPD"), and Officer Merl Sage ("Sage") . 1 In that
action, Palm alleged that Sage used excessive force in fatally shooting her son, Anthony Palm. We have jurisdiction under 28 U.S.C. s 1291, and we affirm.

I. . Dismissal

We review de novo a district court's dismissal for failure to state a claim. See Tyler v. Cisneros, 136 F. 3d. 603, 607 (9th Cir. 1998). "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." Id. Because the parties are familiar with the facts of this case, we need not recount them here.

A. Clark County

The district court dismissed the County as a defendant in this action, holding that, as a matter of law, it could not be held liable for the actions or policies of the LVMPD. Palm contends that the County is liable because it is directly responsible for the proper training and supervision of the LVMPD's employees. We agree with the district court.

A county may be held liable under s 1983 "only where its policies are the 'moving force [behind] the constitutional violation.' " City of Canton v. Harris, 489 U. S. 378, 389 (1998) (quoting Polka County v. Dodson, 454 U. S. 312, 326 (1981). In

1. Clara Palm does not appeal the district court's dismissal of her 42 U. S. C. s 1985 (3) claim against Sage.

this case, the County's only control over the LVMPD is budgetary supervision through the police commission. See Nev. Rev. Stat 280.190-270 (1987). The LVMPD and the county are separate entities -- the policies of the latter are not the "moving force" behind the actions of the former. See Nev. Rev. Stat. S 280.280 (1987). Consequently, the County cannot be held liable for the actions or policies of the LVMPD. Cf. Bruttomesso v. Las Vegas Metro. Police Dep't, 591 P 2d 254, 255-56 (nev. 1979).

B. Punitive Damages Claim

The district court also dismissed Palm's claim for punitive damages against the LVMPD. Palm argues that the LVMPD is responsible for any punitive damages because Sage's actions were willful, wanton, aad reckless. Once again, we agree with the district court.

In a S 1983 suit, a municipality may not be held liable for punitive damages unless expressly authorized by statute. See Newport v Fact Concerts, Inc. 783 U>S 247, 260n. 21 (1981).. Nevada Law is unambiguous: An Award for damages in a tort action against employees of the state or any political subdivision may not include punitive damages. See Nev. Rev. Stat. S 41. 035 (1995). Palm's reliance on Nev. Rev. S 41.032 is misplaced because that statute deals with immunity, not punitive damage. Accordingly, the district court did not err when it dismissed palm's claim for punitive damages against the LVMP

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II. Summary Judgment

We review a grant of summary judgment de novo. SeeWarren v. City of Carlsbad, 58 F. 3d 439, 441 9 (th Cir. 1995). We must determine "whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law." Id.

The district court granted the defendants' motion for summary judgment on the ground that Sage's actions did not amount to an un- constitutional use of force. Palm contends that there are multiple genuine issues of material fact as to whether Sage used excessive force against Anthony Palm. After reviewing the record, we conclude that summary judgment was properly granted.

A s 1983 claim requires: (1) a violation of rights protected by the Constitution (2) by someone acting under color of state law. See Gibson v. United States, 781 F. 2d 1334, 1338 (9th Cir. 1986). Claims against polices officers for the use of excessive force are analyzed under the Fourth Amendment's "objective reasonableness" standard. See Graham v. Connor, 490 U.S. 386, 388 (1989). In determining reasonableness, it must be remembered that "police officers are often forced to make split-second judgment--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in aparticular situation." Id. at 397. A police officer has a right to use such force, including deadly force, as is necessary under the circumstances to protect himself and others from what be reasonably believes to be a threat of great bodily injury or harm.

Appendix B

See Tennessee v. Garner, 471 U.S. 1, 11 (1985) ;: Acosta v. City &
County of San Francisco, 83 F. 3d 1143, 1145 n. 3 (9th Cir. 1996).

Palm first argues that Sage's use of deadly force was unjustified because her son was not armed at the time of the shooting. It is clear, however that a suspect need not have a weapon to pose a threat to an officer. See
Forrett v. Richardson, 112 F. 3d 416, 420 (9th Cir. 1997) ("{T} he suspect need not be armed or pose an immediate threat to the officers or others at the time of the shooting.") , Cert. denied, 1998 WL 138889
(U.S. Mar. 30,1998 (no. 97-7069). The relevant inquiry is whether Sage could have reasonably believed that either he or the victim was threatened with great bodily injury or harm. See Garner, 471 U.S. at 11.

Every witness to the events in question stated that they saw Anthony Palm either move toward or lunge at Sage after Sage ordered him to move away from the victim. Patricia Woodall. Sage had just witnessed Anthony Palm brutally attack and rape Woodall. Given the serious
injuries suffered by the victim, Sage had good reason to believe that Anthony Palm was violent and that deadly force was needed to control the situation. Under these circumstances, he acted reasonably when he fatally shot Anthony Palm. Palm's submission of criminologist R Paul McCauley's affidavit does

not create a triable issue of material fact Because the affidavit neither disputed the various accounts of the witness nor preclides the likelihood that Anthony Palm was advancing toward Sage..

Appendix B

Palm also argues that Sage's actions were unreasonable because they contravened the guidelines and policies of the LVMPD regarding the use of deadly force. It is true that Sage did not identify himself as an officer or state his intention to shoot. The LVMPD guidelines, however, require those actions only "whenever feasible." In this case Anthony Palm forced Sage to act quickly when he advanced toward the officer. As Sage testified, he did not have the opportunity to identify himself before he had to act: it was not "feasible" for him to announce that he was a police officer. Moreover, the fact that Sage's gun was drawn gave at least some indication to Anthony Palm of Sage's intention to shoot. Thus, Sage did not act in contravention of the LVMPD's guidelines and policies.

Finally, Palm argues that Sages actions were unreasonable because the were reacially motivated. The only evidence offered in support of this claim, is the transcript of Sage's 911 call: "a black is raping a female across the street." This evidence is grossly insufficient to show that Sage's response was racially motivation. Palm fails to create a triable issue of material fact.

In light of the foregoing, We are convinced that Sage did not use unconstitutional force. 2 See Graham, 490 U.S. at 388. He acted reasonably under the circumstances of this unfortunate case. Palm has failed to show any genuine issues of material

2 Because we conclude that there was no constitutional violation, we need not reach the municipal liability issue. See Scott v. Henrich, 39 F. 3d 912, 916 (9th Cir. 1994). fact. Thus, the district court did not err when it granted the defendants' motion for summary judgement.

AFFIRMED

(2)

No. 98-520

FILED
NOV 13 1998
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SUPREME COURT, U.S.

In The

# Supreme Court of the United States

October Term, 1998

CLARA PALM,
and as Surviving Parent of
Anthony Robert Palm, deceased,

*Petitioner,*

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a political Subdivision of Clark County, Clark County, a political subdivision of the State of Nevada, and Merl Sage, and Does I through V, inclusive,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS LAS VEGAS METROPOLITAN POLICE DEPARTMENT, CLARK COUNTY, AND MERL SAGE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED FOR REVIEW

Whether the consistent factual statements by all witnesses to the event correctly supported officer Sage's use of deadly force against the decedent rapist?[1]

---

[1] Involved in the Ninth Circuit appeal were issues as to whether dismissal of Clark County was appropriate as an independent political subdivision under Nevada statutory and case law; whether the Judge correctly held there was no evidence of official capacity liability in the litigation; and whether the Judge was correct in holding that punitive damages were unavailable against municipal entities or individuals acting in their official capacity. In the Petition for Writ, however, it appears Petitioner is simply seeking to attack the factual arguments which sustained the use of force by Officer Sage. Accordingly, this Brief in Opposition is directed solely to that issue.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Clara Palm (hereinafter "Petitioner"), acting on behalf of herself and as the surviving parent of Anthony Robert Palm (hereinafter "decedent"). Appearing as Respondents before this Court are the Las Vegas Metropolitan Police Department (hereinafter "LVMPD"), Clark County, and Officer Merl Sage.

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## JURISDICTION

On April 14, 1997, the Honorable Chief Judge Lloyd D. George of the United States District Court for the District of Nevada, entered and served an Order which dismissed Petitioner's litigation in its entirety. *See* Petition at pp. App. 1-9. Thereafter, this matter was timely brought before the Ninth Circuit Court of Appeals and was subjected to its briefing schedule. After considering the briefs, the Ninth Circuit issued its opinion – sustaining the decision of Judge George. *See* Petition at pp. App. 10-16. The Opinion noted the consistent factual evidence in this case sustained the conclusion by Judge George the force used by Officer Merl Sage in this incident was completely justified.

That Opinion was issued on April 22, 1998. It is unclear to Respondents whether this Petition for Writ of Certiorari is timely filed. However, Respondents believe this Court would have disallowed the docketing of the Petition for Writ had it not been timely filed. Accordingly, Respondents believe jurisdiction of this Court is found under 28 U.S.C. § 1254(1) and pursuant to Supreme Court Rule 13(1) and (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents submit Petitioner's Complaint alleged violations of Fourth Amendment rights accruing to the decedent. It should be noted, however, Petitioner was never identified as the legal guardian of the estate of the decedent. Accordingly, she had no standing to bring a

claim for the decedent's damages. The only claim she could fashion would be one under the Fourteenth Amendment. Nevertheless, the analysis involved in determining the propriety of the Court's decision focuses around the Fourth Amendment since it involves issues of whether the force used against the decedent was appropriate. Thus, the Fourth Amendment is the only constitutional provision which is implicated by this Petition.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

This matter was brought, via removal from State Court, before the United States District Court for the District of Nevada, Southern Division, pursuant to 42 U.S.C. § 1983, on December 28, 1995. The Complaint alleged a violation of the decedent's constitutional rights took place when excessive force was used against him by a person acting under color of state law. An Answer was filed on January 8, 1996.

An Amended Complaint was filed to cure the vagueness inherent in the first Complaint which also received an appropriate Answer. The Amended Complaint asserted the shooting of the decedent violated his constitutional rights, and that the shooting occurred in the context of a conspiracy.[2]

---

[2] The conspiracy claim issue was never raised on appeal and is not before this Court.

In the course of the litigation, a comprehensive Motion to Dismiss and for Summary Judgment on behalf of LVMPD, Clark County, and Officer Merl Sage was filed. That Motion, through the use of sworn testimony of key witnesses, attacked the validity of the Fourth Amendment claim. It argued the evidence clearly established the use of force by Merl Sage was appropriate.[3] After receiving an Opposition and Reply Points and Authorities supporting the Motion for Summary Judgment, the Honorable Lloyd D. George issued an extensive Order, on April 15, 1997, which ultimately disposed of the litigation. *See* Petition at App. 1-9.

In that Order, he properly set forth the facts of the case as established by the uncontroverted evidence. While he also disposed of issues which are not presently before this Honorable Court, he also, based on the facts before him, held no material fact existed as to how or why the shooting of the decedent occurred.[4] Having

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[3] In addition, the Motion addressed the insufficiency of evidence regarding any official plan, policy or scheme of LVMPD which could be fairly said to have been the moving force behind any alleged constitutional violation. It also addressed the distinction between LVMPD and Clark County and indicated the County could not be held responsible for the actions of LVMPD under State interpretive law. Finally, it attacked punitive damages against municipal entities and also the dearth of factual evidence to establish a conspiracy claim. As indicated before in this Brief, these issues, however, are not the subject to this Petition for Writ. Instead, the focus is exclusively on whether the use of force was appropriate or not.

[4] Judge George took Petitioner to task for her "presentation" of the evidence in this case. Specifically, he noted that the presentation was "achieved only through an extremely liberal, if not deceptive, use of the evidence." *Id.*

reviewed the evidence in the light most favorable to the non-moving party, he concluded the actions of the decedent unquestionably warranted the use of force and, therefore, the death of the decedent did not rise to the level of constitutional violation. Accordingly, the litigation was dismissed.

On May 9, 1997, a Notice of Appeal on behalf of Petitioner was timely filed with the District Court. The matter then went before the Ninth Circuit Court of Appeals. Petitioner sent a pithy argument to the Circuit and focused on whether the evidence could sustain the decision of Judge George. On April 22, 1998, the Ninth Circuit issued a Memorandum Decision which supported, completely, the decision of Judge George in dismissing this litigation with prejudice. Petition at App. 10-16.

In making its decision, the Ninth Circuit noted – based on the evidence put before it – that every witness consistently saw an assault taking place between the decedent and Patricia Woodall. They were consistent in seeing the decedent either move towards or lunge at Merl Sage – after Merl Sage had ordered him to move away from the victim. Given the circumstances with which Merl Sage was faced, based on the evidence before it, the Ninth Circuit held under those circumstances that he acted reasonably when he fatally shot the decedent. Accordingly, summary judgment was affirmed.

## II. STATEMENT OF THE FACTS[5]

On March 21, 1995 Patricia Woodall was taking a walk in the early morning hours. As she reached the corner of Mountain Vista and Tropicana, she was approached by a silver car which kept stopping and honking the horn – trying to get her attention. As she walked down a residential street, she saw the vehicle pass her and then turn a complete circle. Reaching the corner, she noticed the silver car parked and its driver (the decedent) crossing the street to approach her. She informed him she was going to call the police. He grabbed her, threw her to the ground and punched her repeatedly. They wrestled. *Id.* Ms. Woodall screamed until the decedent began to throttle her. She knew, at that point, she was dying.[6]

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[5] As this brief was being prepared, it was determined the factual supporting documents which form the record in this case were inadvertently not sent to the printer. Accordingly, a revised answering brief, baring specific appendix citations will be filed as soon as possible.

[6] Wisely, Petitioner has chosen to back away from her originally ludicrous position that there was not a rape. Ms. Woodall testified:

> I, I could feel the stage come out of blackout and I knew if I kept going that he would keep going. The man wanted to kill me. He had, it was weird, _____ something but he wanted to kill me. And while I was looking, all this happened in a matter of seconds _____, and as I had my head sideways trying to do this, I seen this house that was across the street right where his car was parked as a matter of fact. Above it was a two story with a two window panes with no curtains there and the light was shining on him to where, um, you couldn't see inside of it and I

Other witnesses also observed this vicious, sadistic rape occurring. Mr. Mizell claimed he heard a loud argument which originally arrested his attention which was, at best, not "really . . . all that loud" by the time he was physically able to observe it. He saw the decedent was "holding the other one down" and, when the decedent dropped his pants, Mr. Mizell realized what was going on so "[he] dialed 9-1-1 immediately." He could hear Ms. Woodall pleading with the decedent to stop and begging him to explain why he was attacking her. He also indicated her face was bloodied and reddened following this gruesome attack.

Carol Ewing testified she thought wrestling was going on between two boys initially when she observed the event. However, she quickly realized one of the "combatants" was female and there was sexual activity occurring. She saw the victim pinned to the ground. So violent was the activity, when the decedent reached behind his back, she "thought he was reaching in his pocket for a knife or something to – to kill this person that was on the ground."

Janice Cobian testified that morning she heard a car door slam and a woman scream. The woman was yelling for help and that someone should get off of her.[7] She

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said somebody is watching us and he's looking up sideways and I said just act like you're my boyfriend, and I won't let them take you. I thought maybe he would loosen up enough to where his hands on my throat so I could breathe and get my arms moving again or something.

[7] It was sufficiently loud that it virtually woke the entire neighborhood.

went to a window and saw a woman on a lawn with a man atop her – punching her in the face and head. That morning, at approximately 6 a.m., Officer Merl Sage and his wife were sleeping in their home. They were awakened by sounds of someone fighting. Their initial observation was two people appeared to be wrestling on the grass. As they changed their view and looked out the bedroom window, it became apparent a woman was being raped.[8] Their observation of the victim showed she was covered with blood on her face and body.

Confronted with this horrific scene, Merl Sage began to get dressed – at the same time grabbing his gun and attempting to dial 911. As his conversation with the dispatcher continued, he realized it would take too long to get the call processed – considering an active and violent rape was occurring outside.[9] Accordingly, he gave the phone to his wife and told her to inform the dispatcher he was going outside with a gun to try and stop the matter. As he ran to the scene, the decedent was still in the actual course of raping the victim.

Standing on the sidewalk to the right of the decedent, Merl Sage pointed his weapon at the decedent and yelled at him "[S]top it. Get away from her. Get back. Get back. Get away." Although his wife could not hear what he

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[8] Mrs. Sage testified the man on top was choking the woman until she went limp; at that point, she saw him remove the victim's jeans and begin the rape.

[9] There is no question the contemporaneous perception of Officer Sage, as expressed to the 911 operator, was that a rape was going forward.

said, she saw him cross the street, saw her husband point the weapon at the suspect, and heard him yell at him.[10] The decedent snapped his head to the right and looked directly at Officer Sage;[11] he immediately started to get off the victim. He pulled on his pants.

The victim immediately got up and ran towards Mr. Sage. She was crying uncontrollably – virtually hysterical. She was clearly terrified. She was covered in blood from the blows which she had received from the decedent.

As she reached Merl Sage, the decedent (who was only 10-12 feet away) charged him. The victim saw a flash of movement. Officer Sage's wife, watching the matter from her home, also saw the decedent lunging forward and estimated that, with two steps, he had halved the distance between himself and her husband. Ms. Ewing testified she observed the rapist moving quickly towards the officer without ever stopping. Mr. Mizell testified the rapist immediately moved towards Merl.[12]

From Merl Sage's standpoint, he watched the assailant slide off the victim and, in a single continuous motion, stand, turn to his right, and charge towards Merl

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[10] This scenario is consistent with the testimony of the rape victim and other witnesses.

[11] In doing so, the decedent looked directly at the weapon which the officer had which was pointed at him.

[12] Mr. Mizell could not tell the decedent "lunged" at Officer Sage because a palm tree was in the way.

in a semi-crouched state. In this tense situation, when the decedent was approximately 4-5 feet away, Merl fired his weapon. The event happened so quickly, Merl did not have time to actually pick up the front sight on his weapon and aim it. There was no question in his mind the decedent was charging at him to take control of the weapon. Officer Sage believed, had he been successfully charged, his weapon could have been taken away from him and both he and the victim would have been killed. The decedent died as the result of those gunshot wounds.

Dr. Jordan, the board-certified forensic pathologist from the Coroner Medical Examiner of Clark County, with over 30 years of experience testified *both* bullet wounds followed essentially the same path; both entered from the front of the body; both were in the upper right chest region *and* both were consistent with Officer Sage firing his weapon while the decedent was in a bent or lunging position.[13] The physical evidence did not reveal which shot was fired first but was consistent with a primary shot to the chest, followed by a second as the decedent crumpled. This directly comports with the consistent and unopposed sworn testimony of the witnesses.[14]

There is no question Officer Sage's actions were appropriate. The facts reveal this entire event took place

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[13] The physical evidence also showed the decedent had a blood alcohol content of .250 at the time he was shot.

[14] Officer Sage testified he fired at "center of mass" – as he was trained – as opposed to trying to wing the decedent. This testimony is consistent with the first shot being more centered on the chest area.

in a matter of moments, that Officer Sage felt mortally threatened and that he withheld firing until the rapist was only 4-5 feet away and coming directly towards him. Any reasonable person, let alone a police officer, similarly situated, would have a geometrically increasing concern this violent rapist was charging him – especially knowing this criminal knew Merl not only was armed, but had the weapon actually trained on the decedent. Officer Sage legitimately feared for his personal safety and the safety of others in his immediate surroundings. Using deadly force in measured response to these legitimate perceptions cannot be seriously questioned.[15]

Based on these undisputed facts, both Judge George and the Ninth Circuit Court of Appeals properly held the actions of the decedent warranted the objectively reasonable belief of Officer Sage that force was required and, therefore, no constitutional violation could exist. On a Petition for Writ of Certiorari, it is respectfully requested this Court should sustain the decision of the Ninth Circuit Court of Appeals and vindicate the actions of Officer Sage in attempting to stop a horrific and bloody rape.

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[15] Even Petitioner's own paid expert conceded that if the decedent was coming directly towards the officer, the shooting would have been a justifiable use of force.

## LEGAL ARGUMENT

### I. STANDARDS FOR GRANTING SUMMARY JUDGMENT

A grant of summary judgment is reviewed de novo. *Still v. Williams*, 919 F.2d 516, 520 (9th Cir. 1990). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see Avia Group Int'l, Inc. v. L.A. Gear Cal.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).[16] Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating a genuine issue for trial. *Program Engineering v. Triangle Publications*, 634 F.2d 1188, 1193 (9th Cir. 1980).

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[16] An issue is only "genuine" if the evidence is such that a reasonable jury, applying the applicable quantum of proof, could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether a fact is "material" depends on substantive law and whether the fact affects the outcome of the lawsuit. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

This burden cannot be met by pleading mere conclusions. There *must* be specific facts showing a genuine issue for trial. A non-moving party is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Richards v. Nielsen Freightlines*, 602 F. Supp. 1224, 1231 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987) (mere allegations or denials, unsubstantiated hope, and threadbare conclusory statements are all insufficient once the moving defendant has met its initial burden).[17]

Evidence not put before the District Court is not considered when reviewing the appealed order or judgment. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). A party must be careful to preserve the issues for appellate review. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976) (quoted by *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978)). As evidence (or argument surrounding the sufficiency of evidence) not presented to or addressed by Judge George cannot be properly considered on subsequent review, so too may it be properly said legal arguments in opposition to the grant of summary judgment are not proper subjects of consideration when initially proffered only to the appellate court. *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 812 (9th Cir. 1982).

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[17] Likewise, a party may not, in an attempt to avoid summary judgment, manufacture issues of fact by submitting conflicting sworn statements by that party. *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975).

Under these facts, there is no question the actions of Officer Sage were entirely appropriate. Accordingly, the Ninth Circuit correctly ruled summary judgment was properly granted in favor of these LVMPD, Clark County, and Officer Sage.

## II. THE SHOOTING OF DECEDENT WAS NOT A FOURTH AMENDMENT VIOLATION

The sworn facts of this case clearly establish a rape was occurring and Merl Sage attempted to stop it. Despite the fact he had his weapon pulled when he ordered the decedent to stop, looked directly at him and saw the weapon, the decedent nevertheless charged at him. This reckless behavior caused him to be shot when he was approximately 3-5 feet from Merl Sage – still in the position of coming forward.[18]

Mrs. Sage testified it looked as though the decedent intended to tackle her husband. The time involved was de minimus. In fact, Officer Sage testified the decedent would have reached him in less than a second. Accordingly, Officer Sage had an honest conviction and fear his

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[18] At the time this event took place, tape recorded statements were made of the various witnesses. While these are not sworn statements and no signatures are found thereon, they were contemporaneously made by investigating officers at the time this incident took place and are consistent in relating the events in the same manner set forth in the Coroner's Inquest. Photographs taken of the victim immediately after this event also show she had been subjected to acts of violence.

life was in physical danger and he acted accordingly.[19] Considering these facts, the question becomes whether firing a weapon at the decedent under these circumstances rose to the level of a constitutional violation under the Fourth Amendment. It is respectfully submitted it did not.

The claim regarding the shooting incident is for excessive force. The use of force is generally considered to affect – in some circumstances – a seizure. "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). *Graham v. Conner*, 490 U.S. 386 (1989), held, when claims of excessive force arise in the context of a citizen at liberty, the proper constitutional analysis comes under the Fourth Amendment right to be free from unreasonable seizures. Thus, the focus becomes whether the force used was *reasonable* or not.

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interest at stake." *Graham*, 490 U.S. at 396. Indeed, this balancing of competing interests has been identified

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[19] Nowhere is this more tragically seen than in the brief exchange between husband and wife which was caught on the dispatch tape. The phone was portable. Mrs. Sage took it with her as she went to attend the victim. Reaching his side, she informed her husband that she was there. His simple statement was "I had to do it." Her attendant response was to assure him she knew he acted only because he had to.

as the *key* principle of the Fourth Amendment. *Michigan v. Summers*, 452 U.S. 692, 700 n. 12 (1981).

In *Graham*, this Court noted Fourth Amendment jurisprudence has long recognized some degree of physical coercion is necessary to effect a seizure. *Graham*, 490 U.S. at 396. The primary question is whether the force is *reasonable*. Because "reasonableness" is not capable of precise definition or mechanical application, the Court noted it required "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, *whether the suspect poses an immediate threat to the safety to the officers or others*, whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (emphasis added). The objective reasonableness of the action "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*[20]

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[20] In such hostile and rapidly evolving circumstances, as an officer confronted with a potential threat from a violent suspect, the Court cannot ask an officer to hold fire to ascertain whether the suspect will, in fact, injure or murder the officer or an innocent bystander.

> It would be unreasonable to require police officers to take unnecessary risk in the performance of their duties. . . . every year in this country many law enforcement officers are killed in the line of duty and thousands more are wounded. Virtually all of these

This sentiment has been echoed in the Ninth Circuit. *Eberle v. City of Anaheim*, 901 F.2d 814 (9th Cir. 1990); *Turner v. County of Washoe*, 759 F. Supp. 630, 635 (D. Nev. 1991). "The reasonableness of force should be analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted." *McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984).

> The court's inquiry is therefore whether the totality of the circumstances (taking into consideration the facts and circumstances of the particular case; including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; whether he is actively resisting arrest or attempting to evade arrest by flight) justified the particular type of seizure.

*Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).

Using these standards, courts have historically held force is acceptable when used to protect an officer or to subdue a combative arrestee. *See Brooks v. Pembroke City Jail*, 722 F. Supp. 1294 (E.D.N.C. 1989); *Butts v. Carey*, 706 F. Supp. 158 (D. Conn. 1988). It is clear Merl Sage acted

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> deaths and a substantial portion of the injuries are inflicted with guns and knives. . . . in view of these facts, we cannot blind ourself to the need of law enforcement officers to protect themselves. . . .

*Terry v. Ohio*, 392 U.S. 1, 23-24 (1968).

appropriately in defending himself and the victim at the time of this incident. He had come upon a situation where a violent act of rape and physical abuse was occurring. The victim desperately screamed for help. She in fact thought she was dying because of being choked by the decedent. Officer Sage ordered the decedent to stop and, instead of obeying his clear and direct order, the decedent chose to charge Mr. Sage.

Given the violent behavior of the decedent in perpetuating the rape, it is only understandable Officer Sage believed his life was in danger. His verbal command for the decedent to back up had not worked. Displaying a weapon did not stop the decedent from lunging forward. Retreat would have been ineffective due to the short amount of time allowed within which he could have reacted. Only as a last measure did he fire his weapon in an act of complete self-defense. This act of instinctive self-preservation is not only understandable and reasonable, it is condoned – indeed, vindicated – by law.

It is universally recognized a person can use deadly force if, under the circumstances, he reasonably believed such force was necessary to protect himself or others from death or serious physical harm. *Reed v. Hoy*, 909 F.2d 324 (9th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991); *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991) (citing *Tennessee*, 471 U.S. at 10-12). In addition, Nevada clearly permits this type of force in this situation. A deliberate killing, if done in actual self-defense, is justifiable against a person who acts in a "violent, riotous, tumultuous or surreptitious manner . . . for the purpose of assaulting or offering personal violence to any person. . . . " N.R.S. § 200.120. The fear or apprehension of such injury must

be corroborated by "the fears of a reasonable person". N.R.S. § 200.130. An individual must show the force was used "under the influence of those fears and not in a spirit of revenge." *Id.*

When a person kills in self-defense, it need only appear the danger was "so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary" and the person who was killed was either the assailant or there had been a good faith effort to decline any further struggle before "the mortal blow was given." N.R.S. § 200.200. It cannot be gainsaid Officer Sage faced a situation in the present instance which presented precisely these facts to his attention.

Arriving on the scene, Merl Sage reasonably requested the decedent to immediately cease his behavior and move away from the victim. He did not immediately shoot the decedent; instead, he utilized a *show* of deadly force to keep the decedent under control by displaying his weapon.[21]

Rather than complying, the decedent quickly moved in the direction of Officer Sage. In two steps he had halved the distance between himself and the officer. He was still coming forward when he was shot. Every percipient witness testified the decedent moved directly in the direction of Officer Sage and was still moving in that direction when he was shot. Officer Sage believed the

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[21] It is not denied the decedent looked directly at the weapon and Officer Sage and knew of their presence.

decedent was lunging for his gun. Clearly this was a situation fraught with the potential for deadly violence against the officer, the victim, and the surrounding neighborhood.

To have waited another instant could have meant the decedent and Merl became involved in a wrestling match for control of the gun. If wrested away, both Sage and the innocent victim could have been killed. It would be unreasonable to ask any person to take such a risk. In fact, this Court cannot require an officer to take such a risk. *Terry*, 392 U.S. at 23-24.

Certainly, given the short amount of time he had to react, Officer Sage had to make a split-decision. His honest and contemporaneous perceptions were that his life and the life of the victim were in immediate danger. Accordingly, he utilized the ultimate act of force and fired his weapon to defend both himself and the victim.[22] No objectively reasonable officer could claim that he acted inappropriately or that he could have attempted other avenues of force to defuse the situation.

Petitioner cannot and has not cited any constitutional jurisprudence that a police officer – facing a situation where an aggressive criminal was rapidly approaching,

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[22] It must be remembered he was not in uniform at the time. The only weapon of defense available to him was a hand gun. He cannot be expected to sit back and allow a woman to be raped outside his home and do nothing. To allow Petitioner to pursue this action in the face of these overwhelming facts does a serious injustice to the commendable behavior which Merl showed in this instance in protecting the life of this young woman and his own life.

despite being ordered to stay put, is only 4-5 feet away and still approaching rapidly, and the officer is without backup – is required to withhold fire. To the contrary, courts resolutely hold the firing of a service weapon in such a situation is imminently justifiable. *See O'Neal v. DeKalb County, Georgia*, 667 F. Supp. 853, 858 (N.D. Ga. 1987), *aff'd*, 850 F.2d 653 (11th Cir. 1988) (the Constitution does not require police officers use the minimum of force when attempting to stop a suspect from using deadly force against a police officer or others).

Petitioner has argued Officer Sage was wrong for not identifying himself as a police officer. For this to have value, the Court must reach the conclusion that a criminal perpetrator who will not stop when confronted by a citizen who is armed with a firearm which is pointed directly at the perpetrator, *will* stop simply because the citizen announces that he/she is a police officer. Certainly there is no evidence in this case that that was true or that such an event is required before the use of deadly force is appropriate.[23] These arguments, therefore, are irrelevant

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[23] Indeed, while Petitioner makes the argument Officer Sage was "on-duty" at the time he fired his weapon due to the fact that he was a police officer, it is also universally conceded Officer Sage utilized no outward trappings to indicate the indicia of authority. In other words, he showed no badge, failed to identify himself as a police officer, and had no unique markings that would have let the decedent know that he was, in fact, a police officer. To the decedent rapist's mind, Officer Sage could simply have been a conscientious citizen attempting to protect the life of another. Because the outward trappings of authority were not utilized to justify Officer Sage's behavior or attempt to gain compliance from the decedent, it could well be argued his actions failed to create a constitutional violation because there was no color of state law.

to the decision of whether the officer acted correctly in defending his life.

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It is elemental that to sustain an action under § 1983 a plaintiff must show (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a constitutional right. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Petitioner is unable to show under these circumstances that the conduct was committed by a person acting under color of state law.

This element is crucial to determining whether a § 1983 action has viability. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). This Court has held "that misuse of power, possessed by virtue of state law and made possible *only* because a wrongdoer is cloaked with the authority of state law, is action taken 'under color of' state law." *Lugar*, 457 U.S. at 929. The acts of the state employee must be under "pretense" of some state law. *Screws v. United States*, 325 U.S. 91, 111 (1945). That pretense is lacking if the wrongful acts are not, in any way, related to the performance of the duties of the state employee. *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968). "[A]cts of officers in the ambit of their personal pursuits are plainly excluded." *Screws*, 325 U.S. at 111.

*Johnson* held that where two officers had provoked black citizens to fight based on their shouting of racial insults to those individuals and, indeed, offered to fight, and, thereafter, had the individuals arrested for disorderly conduct, those actions failed to occur under color of state law.

> The acts complained of here were not under "pretense" of law. They were not committed in the performance of any actual or pretended duty of policemen. They were not acts these defendants could not have committed but for the cloak of the state's authority. It is not alleged the offer to fight was in any way related to the performance of police duties. Quite to the contrary, the purely personal nature of the offer is emphasized by the allegation that, before the

Petitioner also conveniently ignores the fact her own expert testified that if, as the physical evidence absolutely mandates occurred, the decedent was coming directly towards the officer – after having been told to stop – then *the shooting would be justified*. While there may be an argument as to whether the decedent/rapist "lunged" or not, there is no question his movements were directly towards the officer and at a rapid pace.

What Petitioner expects, apparently, is that Officer Sage somehow be a Superman. When the show of deadly force was insufficient to stop the decedent rapist from approaching the officer in an aggressive manner, Officer Sage, should have utilized Kung-Fu, additional verbal judo, or perhaps said "pretty please." However, whether any of these actions would have stopped this crazed and drunken rapist from his irrational behavior is sheer speculation on the part of Petitioner and is completely unsupported by any evidence or testimony – either from percipient witnesses or from any expert in this case. Certainly, it is an insufficient basis upon which to predicate an opposition to summary judgment.

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> challenge was issued, [the officer] removed his gun belt, laying aside, as it were, the symbol or "pretense" of police authority. As for the name-calling, I can conceive of no more "personal pursuit." No police duty or power of which I am aware can possibly be construed as clothing an officer with the authority of law to call anyone insulting names.

284 F. Supp. at 937. In this case, since there was no evidence that Officer Sage acted with the indicia of legal authority in firing his weapon, the failure of the presence of the color of state law was fatal to Petitioner's claims and was also appropriate as an alternative basis for dismissal.

In short, there is no evidence in this case Officer Merl Sage acted in a manner inconsistent with what any other objectively reasonable officer would have done under the same or similar pressing circumstances with which he was confronted on March 21, 1995. It is not sufficient to argue that alternative means were available to the officer in hindsight. The relevant analysis is whether, at the time the shooting occurred, given the stress of the situation, the fact that a bloody and violent rape was taking place in a quiet neighborhood, the fact that the decedent rapist saw Officer Sage wielding a weapon and refused to acquiesce to his commands, but, rather than fleeing *away* from the officer, came directly *toward* the officer, warranted this shooting. No objectively reasonable officer could have acted in a different manner. Accordingly, the Ninth Circuit affirmed that Judge George was absolutely correct when he held that no constitutional violation took place in this shooting. On appeal, this Honorable Court is implored to follow that same reasoning and deny the Petition for Writ or Certiorari for the frivolous attempt it is.

## CONCLUSION

For the foregoing reasons, Respondents LVMPD, Clark County, and Merl Sage respectfully request this Court deny Petitioner's Petition for Writ of Certiorari and allow the Ninth Circuit decision to stand.

Respectfully submitted this 13th day of November, 1998.

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(3)

No. 98-520

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1998

CLARA PALM,
and as Surviving Parent of
Anthony Robert Palm, deceased,

*Petitioner,*

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a political Subdivision of Clark County, Clark County, a political subdivision of the State of Nevada, and Merl Sage, and Does I through V, inclusive,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS LAS VEGAS METROPOLITAN POLICE DEPARTMENT, CLARK COUNTY, AND MERL SAGE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED FOR REVIEW

Whether the consistent factual statements by all witnesses to the event correctly supported officer Sage's use of deadly force against the decedent rapist?[1]

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[1] Involved in the Ninth Circuit appeal were issues as to whether dismissal of Clark County was appropriate as an independent political subdivision under Nevada statutory and case law; whether the Judge correctly held there was no evidence of official capacity liability in the litigation; and whether the Judge was correct in holding that punitive damages were unavailable against municipal entities or individuals acting in their official capacity. In the Petition for Writ, however, it appears Petitioner is simply seeking to attack the factual arguments which sustained the use of force by Officer Sage. Accordingly, this Brief in Opposition is directed solely to that issue.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Clara Palm (hereinafter "Petitioner"), acting on behalf of herself and as the surviving parent of Anthony Robert Palm (hereinafter "decedent"). Appearing as Respondents before this Court are the Las Vegas Metropolitan Police Department (hereinafter "LVMPD"), Clark County, and Officer Merl Sage.

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## JURISDICTION

On April 14, 1997, the Honorable Chief Judge Lloyd D. George of the United States District Court for the District of Nevada, entered and served an Order which dismissed Petitioner's litigation in its entirety. *See* Petition at pp. App. 1-9. Thereafter, this matter was timely brought before the Ninth Circuit Court of Appeals and was subjected to its briefing schedule. After considering the briefs, the Ninth Circuit issued its opinion – sustaining the decision of Judge George. *See* Petition at pp. App. 10-16. The Opinion noted the consistent factual evidence in this case sustained the conclusion by Judge George the force used by Officer Merl Sage in this incident was completely justified.

That Opinion was issued on April 22, 1998. It is unclear to Respondents whether this Petition for Writ of Certiorari is timely filed. However, Respondents believe this Court would have disallowed the docketing of the Petition for Writ had it not been timely filed. Accordingly, Respondents believe jurisdiction of this Court is found under 28 U.S.C. § 1254(1) and pursuant to Supreme Court Rule 13(1) and (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents submit Petitioner's Complaint alleged violations of Fourth Amendment rights accruing to the decedent. It should be noted, however, Petitioner was never identified as the legal guardian of the estate of the decedent. Accordingly, she had no standing to bring a

claim for the decedent's damages. The only claim she could fashion would be one under the Fourteenth Amendment. Nevertheless, the analysis involved in determining the propriety of the Court's decision focuses around the Fourth Amendment since it involves issues of whether the force used against the decedent was appropriate. Thus, the Fourth Amendment is the only constitutional provision which is implicated by this Petition.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

This matter was brought, via removal from State Court, before the United States District Court for the District of Nevada, Southern Division, pursuant to 42 U.S.C. § 1983, on December 28, 1995. The Complaint alleged a violation of the decedent's constitutional rights took place when excessive force was used against him by a person acting under color of state law. An Answer was filed on January 8, 1996.

An Amended Complaint was filed to cure the vagueness inherent in the first Complaint which also received an appropriate Answer. The Amended Complaint asserted the shooting of the decedent violated his constitutional rights, and that the shooting occurred in the context of a conspiracy.[2]

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[2] The conspiracy claim issue was never raised on appeal and is not before this Court.

In the course of the litigation, a comprehensive Motion to Dismiss and for Summary Judgment on behalf of LVMPD, Clark County, and Officer Merl Sage was filed. That Motion, through the use of sworn testimony of key witnesses, attacked the validity of the Fourth Amendment claim. It argued the evidence clearly established the use of force by Merl Sage was appropriate.[3] After receiving an Opposition and Reply Points and Authorities supporting the Motion for Summary Judgment, the Honorable Lloyd D. George issued an extensive Order, on April 15, 1997, which ultimately disposed of the litigation. *See* Petition at App. 1-9.

In that Order, he properly set forth the facts of the case as established by the uncontroverted evidence. While he also disposed of issues which are not presently before this Honorable Court, he also, based on the facts before him, held no material fact existed as to how or why the shooting of the decedent occurred.[4] Having

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[3] In addition, the Motion addressed the insufficiency of evidence regarding any official plan, policy or scheme of LVMPD which could be fairly said to have been the moving force behind any alleged constitutional violation. It also addressed the distinction between LVMPD and Clark County and indicated the County could not be held responsible for the actions of LVMPD under State interpretive law. Finally, it attacked punitive damages against municipal entities and also the dearth of factual evidence to establish a conspiracy claim. As indicated before in this Brief, these issues, however, are not the subject to this Petition for Writ. Instead, the focus is exclusively on whether the use of force was appropriate or not.

[4] Judge George took Petitioner to task for her "presentation" of the evidence in this case. Specifically, he noted that the presentation was "achieved only through an extremely liberal, if not deceptive, use of the evidence." *Id.*

reviewed the evidence in the light most favorable to the non-moving party, he concluded the actions of the decedent unquestionably warranted the use of force and, therefore, the death of the decedent did not rise to the level of constitutional violation. Accordingly, the litigation was dismissed.

On May 9, 1997, a Notice of Appeal on behalf of Petitioner was timely filed with the District Court. The matter then went before the Ninth Circuit Court of Appeals. Petitioner sent a pithy argument to the Circuit and focused on whether the evidence could sustain the decision of Judge George. On April 22, 1998, the Ninth Circuit issued a Memorandum Decision which supported, completely, the decision of Judge George in dismissing this litigation with prejudice. Petition at App. 10-16.

In making its decision, the Ninth Circuit noted – based on the evidence put before it – that every witness consistently saw an assault taking place between the decedent and Patricia Woodall. They were consistent in seeing the decedent either move towards or lunge at Merl Sage – after Merl Sage had ordered him to move away from the victim. Given the circumstances with which Merl Sage was faced, based on the evidence before it, the Ninth Circuit held under those circumstances that he acted reasonably when he fatally shot the decedent. Accordingly, summary judgment was affirmed.

## II. STATEMENT OF THE FACTS[5]

On March 21, 1995 Patricia Woodall was taking a walk in the early morning hours. SA 17 As she reached the corner of Mountain Vista and Tropicana, she was approached by a silver car which kept stopping and honking the horn – trying to get her attention. SA 17-18 As she walked down a residential street, she saw the vehicle pass her and then turn a complete circle. SA 18-19 Reaching the corner, she noticed the silver car parked and its driver (the decedent) crossing the street to approach her. SA 19-20 She informed him she was going to call the police. *Id.* He grabbed her, threw her to the ground and punched her repeatedly. SA 20-21 They wrestled. *Id.* Ms. Woodall screamed until the decedent began to throttle her. *Id.* She knew, at that point, she was dying.[6] SA 22, 24

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[5] As this brief was being prepared, it was determined the factual supporting documents which form the record in this case were inadvertently not sent to the printer. Accordingly, a revised answering brief, baring specific appendix citations will be filed as soon as possible.

[6] Wisely, Petitioner has chosen to back away from her originally ludicrous position that there was not a rape. Ms. Woodall testified:

> I, I could feel the stage come out of blackout and I knew if I kept going that he would keep going. The man wanted to kill me. He had, it was weird, _____ something but he wanted to kill me. And while I was looking, all this happened in a matter of seconds _____, and as I had my head sideways trying to do this, I seen this house that was across the street right where his car was parked as a matter of fact. Above it was a two story with a two window panes with no curtains there and the light was shining on

Other witnesses also observed this vicious, sadistic rape occurring. Mr. Mizell claimed he heard a loud argument which originally arrested his attention which was, at best, not "really . . . all that loud" by the time he was physically able to observe it. SA 81; SA 14; SA 107 He saw the decedent was "holding the other one down" and, when the decedent dropped his pants, Mr. Mizell realized what was going on so "[he] dialed 9-1-1 immediately." SA 81 He could hear Ms. Woodall pleading with the decedent to stop and begging him to explain why he was attacking her. SA 83 He also indicated her face was bloodied and reddened following this gruesome attack. SA 84

Carol Ewing testified she thought wrestling was going on between two boys initially when she observed the event. However, she quickly realized one of the "combatants" was female and there was sexual activity occurring. SA 4 She saw the victim pinned to the ground. SA 74 So violent was the activity, when the decedent reached behind his back, she "thought he was reaching in his pocket for a knife or something to – to kill this person that was on the ground." SA 67; SA 75-76, SA 12-13

Janice Cobian testified that morning she heard a car door slam and a woman scream. SA 25 The woman was yelling for help and that someone should get off of her.[7]

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him to where, um, you couldn't see inside of it and I said somebody is watching us and he's looking up sideways and I said just act like you're my boyfriend, and I won't let them take you. I thought maybe he would loosen up enough to where his hands on my throat so I could breathe and get my arms moving again or something. SA 23

[7] It was sufficiently loud that it virtually woke the entire neighborhood. SA 12, 14, 25, 27-28, 39-40

*Id.* She went to a window and saw a woman on a lawn with a man atop her – punching her in the face and head. SA 26 That morning, at approximately 6 a.m., Officer Merl Sage and his wife were sleeping in their home. SA 27, 39 They were awakened by sounds of someone fighting. *Id.* Their initial observation was two people appeared to be wrestling on the grass. SA 28-29, 40 As they changed their view and looked out the bedroom window, it became apparent a woman was being raped. SA 29, 40-41[8] Their observation of the victim showed she was covered with blood on her face and body. SA 43

Confronted with this horrific scene, Merl Sage began to get dressed – at the same time grabbing his gun and attempting to dial 911 SA 41. As his conversation with the dispatcher continued, he realized it would take too long to get the call processed – considering an active and violent rape was occurring outside.[9] Accordingly, he gave the phone to his wife and told her to inform the dispatcher he was going outside with a gun to try and stop the matter. SA 30-31, SA 41-42 As he ran to the scene, the decedent was still in the actual course of raping the victim. SA 42

Standing on the sidewalk to the right of the decedent, Merl Sage pointed his weapon at the decedent and yelled at him "[S]top it. Get away from her. Get back. Get back. Get away." SA 43 Although his wife could not hear what he

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[8] Mrs. Sage testified the man on top was choking the woman until she went limp; at that point, she saw him remove the victim's jeans and begin the rape. SA 29

[9] There is no question the contemporaneous perception of Officer Sage, as expressed to the 911 operator, was that a rape was going forward. SA 89

said, she saw him cross the street, saw her husband point the weapon at the suspect, and heard him yell at him.[10] SA 32 The decedent snapped his head to the right and looked directly at Officer Sage;[11] he immediately started to get off the victim. SA 43, 23 He pulled on his pants. SA 43-45; *see also* SA 8, 15, 32, 52

The victim immediately got up and ran towards Mr. Sage. SA 8, 23 She was crying uncontrollably – virtually hysterical. SA 8-11, 16 She was clearly terrified. She was covered in blood from the blows which she had received from the decedent. SA 16

As she reached Merl Sage, the decedent (who was only 10-12 feet away) charged him. The victim saw a flash of movement. SA 23 Officer Sage's wife, watching the matter from her home, also saw the decedent lunging forward and estimated that, with two steps, he had halved the distance between himself and her husband. SA 32-33 Ms. Ewing testified she observed the rapist moving quickly towards the officer without ever stopping. SA 8 Mr. Mizell testified the rapist immediately moved towards Merl.[12] SA 15

From Merl Sage's standpoint, he watched the assailant slide off the victim and, in a single continuous motion, stand, turn to his right, and charge towards Merl

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[10] This scenario is consistent with the testimony of the rape victim and other witnesses. SA 8, 15, 23

[11] In doing so, the decedent looked directly at the weapon which the officer had which was pointed at him. SA 43-44

[12] Mr. Mizell could not tell the decedent "lunged" at Officer Sage because a palm tree was in the way. SA 15

in a semi-crouched state. SA 43-46 In this tense situation, when the decedent was approximately 4-5 feet away, Merl fired his weapon. SA 46 The event happened so quickly, Merl did not have time to actually pick up the front sight on his weapon and aim it. SA 47 There was no question in his mind the decedent was charging at him to take control of the weapon. SA 47-48 Officer Sage believed, had he been successfully charged, his weapon could have been taken away from him and both he and the victim would have been killed. *Id.* The decedent died as the result of those gunshot wounds.

Dr. Jordan, the board-certified forensic pathologist from the Coroner Medical Examiner of Clark County, with over 30 years of experience (SA 35) testified *both* bullet wounds followed essentially the same path; both entered from the front of the body; both were in the upper right chest region *and* both were consistent with Officer Sage firing his weapon while the decedent was in a bent or lunging position.[13] SA 36-38 The physical evidence did not reveal which shot was fired first but was consistent with a primary shot to the chest, followed by a second as the decedent crumpled. SA 38 This directly comports with the consistent and unopposed sworn testimony of the witnesses.[14]

There is no question Officer Sage's actions were appropriate. The facts reveal this entire event took place

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[13] The physical evidence also showed the decedent had a blood alcohol content of .250 at the time he was shot. SA 37-38

[14] Officer Sage testified he fired at "center of mass" – as he was trained – as opposed to trying to wing the decedent. SA 47 This testimony is consistent with the first shot being more centered on the chest area.

in a matter of moments, that Officer Sage felt mortally threatened and that he withheld firing until the rapist was only 4-5 feet away and coming directly towards him. Any reasonable person, let alone a police officer, similarly situated, would have a geometrically increasing concern this violent rapist was charging him – especially knowing this criminal knew Merl not only was armed, but had the weapon actually trained on the decedent. Officer Sage legitimately feared for his personal safety and the safety of others in his immediate surroundings. Using deadly force in measured response to these legitimate perceptions cannot be seriously questioned.[15]

Based on these undisputed facts, both Judge George and the Ninth Circuit Court of Appeals properly held the actions of the decedent warranted the objectively reasonable belief of Officer Sage that force was required and, therefore, no constitutional violation could exist. On a Petition for Writ of Certiorari, it is respectfully requested this Court should sustain the decision of the Ninth Circuit Court of Appeals and vindicate the actions of Officer Sage in attempting to stop a horrific and bloody rape.

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[15] Even Petitioner's own paid expert conceded that if the decedent was coming directly towards the officer, the shooting would have been a justifiable use of force. SA 103-108

## LEGAL ARGUMENT

### I. STANDARDS FOR GRANTING SUMMARY JUDGMENT

A grant of summary judgment is reviewed de novo. *Still v. Williams*, 919 F.2d 516, 520 (9th Cir. 1990). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see Avia Group Int'l, Inc. v. L.A. Gear Cal.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).[16] Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating a genuine issue for trial. *Program Engineering v. Triangle Publications*, 634 F.2d 1188, 1193 (9th Cir. 1980).

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[16] An issue is only "genuine" if the evidence is such that a reasonable jury, applying the applicable quantum of proof, could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether a fact is "material" depends on substantive law and whether the fact affects the outcome of the lawsuit. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

This burden cannot be met by pleading mere conclusions. There *must* be specific facts showing a genuine issue for trial. A non-moving party is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Richards v. Nielsen Freightlines*, 602 F. Supp. 1224, 1231 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987) (mere allegations or denials, unsubstantiated hope, and threadbare conclusory statements are all insufficient once the moving defendant has met its initial burden).[17]

Evidence not put before the District Court is not considered when reviewing the appealed order or judgment. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). A party must be careful to preserve the issues for appellate review. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976) (quoted by *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978)). As evidence (or argument surrounding the sufficiency of evidence) not presented to or addressed by Judge George cannot be properly considered on subsequent review, so too may it be properly said legal arguments in opposition to the grant of summary judgment are not proper subjects of consideration when initially proffered only to the appellate court. *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 812 (9th Cir. 1982).

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[17] Likewise, a party may not, in an attempt to avoid summary judgment, manufacture issues of fact by submitting conflicting sworn statements by that party. *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975).

Under these facts, there is no question the actions of Officer Sage were entirely appropriate. Accordingly, the Ninth Circuit correctly ruled summary judgment was properly granted in favor of these LVMPD, Clark County, and Officer Sage.

## II. THE SHOOTING OF DECEDENT WAS NOT A FOURTH AMENDMENT VIOLATION

The sworn facts of this case clearly establish a rape was occurring and Merl Sage attempted to stop it. Despite the fact he had his weapon pulled when he ordered the decedent to stop, looked directly at him and saw the weapon, the decedent nevertheless charged at him. This reckless behavior caused him to be shot when he was approximately 3-5 feet from Merl Sage – still in the position of coming forward.[18]

Mrs. Sage testified it looked as though the decedent intended to tackle her husband. SA 33 The time involved was de minimus. In fact, Officer Sage testified the decedent would have reached him in less than a second. SA 49 Accordingly, Officer Sage had an honest conviction and fear

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[18] At the time this event took place, tape recorded statements were made of the various witnesses. SA 52-60; 61-67; 68-72; 73-79; 80-87; 89-90. While these are not sworn statements and no signatures are found thereon, they were contemporaneously made by investigating officers at the time this incident took place and are consistent in relating the events in the same manner set forth in the Coroner's Inquest. Photographs taken of the victim immediately after this event also show she had been subjected to acts of violence. SA 88 (Photo excluded).

his life was in physical danger and he acted accordingly.[19] SA 49, 50 Considering these facts, the question becomes whether firing a weapon at the decedent under these circumstances rose to the level of a constitutional violation under the Fourth Amendment. It is respectfully submitted it did not.

The claim regarding the shooting incident is for excessive force. The use of force is generally considered to affect – in some circumstances – a seizure. "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). *Graham v. Conner*, 490 U.S. 386 (1989), held, when claims of excessive force arise in the context of a citizen at liberty, the proper constitutional analysis comes under the Fourth Amendment right to be free from unreasonable seizures. Thus, the focus becomes whether the force used was *reasonable* or not.

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interest at stake." *Graham*, 490 U.S. at 396. Indeed, this balancing of competing interests has been identified

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[19] Nowhere is this more tragically seen than in the brief exchange between husband and wife which was caught on the dispatch tape. The phone was portable. SA 90 Mrs. Sage took it with her as she went to attend the victim. Reaching his side, she informed her husband that she was there. *Id.* His simple statement was "I had to do it." *Id.* Her attendant response was to assure him she knew he acted only because he had to. *Id.*

as the *key* principle of the Fourth Amendment. *Michigan v. Summers*, 452 U.S. 692, 700 n. 12 (1981).

In *Graham*, this Court noted Fourth Amendment jurisprudence has long recognized some degree of physical coercion is necessary to effect a seizure. *Graham*, 490 U.S. at 396. The primary question is whether the force is *reasonable*. Because "reasonableness" is not capable of precise definition or mechanical application, the Court noted it required "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, *whether the suspect poses an immediate threat to the safety to the officers or others*, whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (emphasis added). The objective reasonableness of the action "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*[20]

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[20] In such hostile and rapidly evolving circumstances, as an officer confronted with a potential threat from a violent suspect, the Court cannot ask an officer to hold fire to ascertain whether the suspect will, in fact, injure or murder the officer or an innocent bystander.

> It would be unreasonable to require police officers to take unnecessary risk in the performance of their duties. . . . every year in this country many law enforcement officers are killed in the line of duty and thousands more are wounded. Virtually all of these

This sentiment has been echoed in the Ninth Circuit. *Eberle v. City of Anaheim*, 901 F.2d 814 (9th Cir. 1990); *Turner v. County of Washoe*, 759 F. Supp. 630, 635 (D. Nev. 1991). "The reasonableness of force should be analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted." *McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984).

> The court's inquiry is therefore whether the totality of the circumstances (taking into consideration the facts and circumstances of the particular case; including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; whether he is actively resisting arrest or attempting to evade arrest by flight) justified the particular type of seizure.

*Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).

Using these standards, courts have historically held force is acceptable when used to protect an officer or to subdue a combative arrestee. *See Brooks v. Pembroke City Jail*, 722 F. Supp. 1294 (E.D.N.C. 1989); *Butts v. Carey*, 706 F. Supp. 158 (D. Conn. 1988). It is clear Merl Sage acted

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> deaths and a substantial portion of the injuries are inflicted with guns and knives. . . . in view of these facts, we cannot blind ourself to the need of law enforcement officers to protect themselves. . . .

*Terry v. Ohio*, 392 U.S. 1, 23-24 (1968).

appropriately in defending himself and the victim at the time of this incident. He had come upon a situation where a violent act of rape and physical abuse was occurring. The victim desperately screamed for help. She in fact thought she was dying because of being choked by the decedent. Officer Sage ordered the decedent to stop and, instead of obeying his clear and direct order, the decedent chose to charge Mr. Sage.

Given the violent behavior of the decedent in perpetuating the rape, it is only understandable Officer Sage believed his life was in danger. His verbal command for the decedent to back up had not worked. Displaying a weapon did not stop the decedent from lunging forward. Retreat would have been ineffective due to the short amount of time allowed within which he could have reacted. Only as a last measure did he fire his weapon in an act of complete self-defense. This act of instinctive self-preservation is not only understandable and reasonable, it is condoned – indeed, vindicated – by law.

It is universally recognized a person can use deadly force if, under the circumstances, he reasonably believed such force was necessary to protect himself or others from death or serious physical harm. *Reed v. Hoy*, 909 F.2d 324 (9th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991); *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991) (citing *Tennessee*, 471 U.S. at 10-12). In addition, Nevada clearly permits this type of force in this situation. A deliberate killing, if done in actual self-defense, is justifiable against a person who acts in a "violent, riotous, tumultuous or surreptitious manner . . . for the purpose of assaulting or offering personal violence to any person. . . . " N.R.S. § 200.120. The fear or apprehension of such injury must

be corroborated by "the fears of a reasonable person". N.R.S. § 200.130. An individual must show the force was used "under the influence of those fears and not in a spirit of revenge." *Id.*

When a person kills in self-defense, it need only appear the danger was "so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary" and the person who was killed was either the assailant or there had been a good faith effort to decline any further struggle before "the mortal blow was given." N.R.S. § 200.200. It cannot be gainsaid Officer Sage faced a situation in the present instance which presented precisely these facts to his attention.

Arriving on the scene, Merl Sage reasonably requested the decedent to immediately cease his behavior and move away from the victim. He did not immediately shoot the decedent; instead, he utilized a *show* of deadly force to keep the decedent under control by displaying his weapon.[21]

Rather than complying, the decedent quickly moved in the direction of Officer Sage. In two steps he had halved the distance between himself and the officer. He was still coming forward when he was shot. Every percipient witness testified the decedent moved directly in the direction of Officer Sage and was still moving in that direction when he was shot. Officer Sage believed the

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[21] It is not denied the decedent looked directly at the weapon and Officer Sage and knew of their presence.

decedent was lunging for his gun. Clearly this was a situation fraught with the potential for deadly violence against the officer, the victim, and the surrounding neighborhood.

To have waited another instant could have meant the decedent and Merl became involved in a wrestling match for control of the gun. If wrested away, both Sage and the innocent victim could have been killed. It would be unreasonable to ask any person to take such a risk. In fact, this Court cannot require an officer to take such a risk. *Terry*, 392 U.S. at 23-24.

Certainly, given the short amount of time he had to react, Officer Sage had to make a split-decision. His honest and contemporaneous perceptions were that his life and the life of the victim were in immediate danger. Accordingly, he utilized the ultimate act of force and fired his weapon to defend both himself and the victim.[22] No objectively reasonable officer could claim that he acted inappropriately or that he could have attempted other avenues of force to defuse the situation.

Petitioner cannot and has not cited any constitutional jurisprudence that a police officer – facing a situation where an aggressive criminal was rapidly approaching,

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[22] It must be remembered he was not in uniform at the time. The only weapon of defense available to him was a hand gun. He cannot be expected to sit back and allow a woman to be raped outside his home and do nothing. To allow Petitioner to pursue this action in the face of these overwhelming facts does a serious injustice to the commendable behavior which Merl showed in this instance in protecting the life of this young woman and his own life.

despite being ordered to stay put, is only 4-5 feet away and still approaching rapidly, and the officer is without backup – is required to withhold fire. To the contrary, courts resolutely hold the firing of a service weapon in such a situation is imminently justifiable. *See O'Neal v. DeKalb County, Georgia*, 667 F. Supp. 853, 858 (N.D. Ga. 1987), *aff'd*, 850 F.2d 653 (11th Cir. 1988) (the Constitution does not require police officers use the minimum of force when attempting to stop a suspect from using deadly force against a police officer or others).

Petitioner has argued Officer Sage was wrong for not identifying himself as a police officer. For this to have value, the Court must reach the conclusion that a criminal perpetrator who will not stop when confronted by a citizen who is armed with a firearm which is pointed directly at the perpetrator, *will* stop simply because the citizen announces that he/she is a police officer. Certainly there is no evidence in this case that that was true or that such an event is required before the use of deadly force is appropriate.[23] These arguments, therefore, are irrelevant

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[23] Indeed, while Petitioner makes the argument Officer Sage was "on-duty" at the time he fired his weapon due to the fact that he was a police officer, it is also universally conceded Officer Sage utilized no outward trappings to indicate the indicia of authority. In other words, he showed no badge, failed to identify himself as a police officer, and had no unique markings that would have let the decedent know that he was, in fact, a police officer. To the decedent rapist's mind, Officer Sage could simply have been a conscientious citizen attempting to protect the life of another. Because the outward trappings of authority were not utilized to justify Officer Sage's behavior or attempt to gain compliance from the decedent, it could well be argued his actions failed to create a constitutional violation because there was no color of state law.

to the decision of whether the officer acted correctly in defending his life.

---

It is elemental that to sustain an action under § 1983 a plaintiff must show (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a constitutional right. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Petitioner is unable to show under these circumstances that the conduct was committed by a person acting under color of state law.

This element is crucial to determining whether a § 1983 action has viability. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). This Court has held "that misuse of power, possessed by virtue of state law and made possible *only* because a wrongdoer is cloaked with the authority of state law, is action taken 'under color of' state law." *Lugar*, 457 U.S. at 929. The acts of the state employee must be under "pretense" of some state law. *Screws v. United States*, 325 U.S. 91, 111 (1945). That pretense is lacking if the wrongful acts are not, in any way, related to the performance of the duties of the state employee. *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968). "[A]cts of officers in the ambit of their personal pursuits are plainly excluded." *Screws*, 325 U.S. at 111.

*Johnson* held that where two officers had provoked black citizens to fight based on their shouting of racial insults to those individuals and, indeed, offered to fight, and, thereafter, had the individuals arrested for disorderly conduct, those actions failed to occur under color of state law.

> The acts complained of here were not under "pretense" of law. They were not committed in the performance of any actual or pretended duty of policemen. They were not acts these defendants could not have committed but for the cloak of the state's authority. It is not alleged the offer to fight was in any way related to the performance of police duties. Quite to the contrary, the purely personal nature of the offer is emphasized by the allegation that, before the

Petitioner also conveniently ignores the fact her own expert testified that if, as the physical evidence absolutely mandates occurred, the decedent was coming directly towards the officer – after having been told to stop – then *the shooting would be justified*. While there may be an argument as to whether the decedent/rapist "lunged" or not, there is no question his movements were directly towards the officer and at a rapid pace.

What Petitioner expects, apparently, is that Officer Sage somehow be a Superman. When the show of deadly force was insufficient to stop the decedent rapist from approaching the officer in an aggressive manner, Officer Sage, should have utilized Kung-Fu, additional verbal judo, or perhaps said "pretty please." However, whether any of these actions would have stopped this crazed and drunken rapist from his irrational behavior is sheer speculation on the part of Petitioner and is completely unsupported by any evidence or testimony – either from percipient witnesses or from any expert in this case. Certainly, it is an insufficient basis upon which to predicate an opposition to summary judgment.

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> challenge was issued, [the officer] removed his gun belt, laying aside, as it were, the symbol or "pretense" of police authority. As for the name-calling, I can conceive of no more "personal pursuit." No police duty or power of which I am aware can possibly be construed as clothing an officer with the authority of law to call anyone insulting names.

284 F. Supp. at 937. In this case, since there was no evidence that Officer Sage acted with the indicia of legal authority in firing his weapon, the failure of the presence of the color of state law was fatal to Petitioner's claims and was also appropriate as an alternative basis for dismissal.

In short, there is no evidence in this case Officer Merl Sage acted in a manner inconsistent with what any other objectively reasonable officer would have done under the same or similar pressing circumstances with which he was confronted on March 21, 1995. It is not sufficient to argue that alternative means were available to the officer in hindsight. The relevant analysis is whether, at the time the shooting occurred, given the stress of the situation, the fact that a bloody and violent rape was taking place in a quiet neighborhood, the fact that the decedent rapist saw Officer Sage wielding a weapon and refused to acquiesce to his commands, but, rather than fleeing *away* from the officer, came directly *toward* the officer, warranted this shooting. No objectively reasonable officer could have acted in a different manner. Accordingly, the Ninth Circuit affirmed that Judge George was absolutely correct when he held that no constitutional violation took place in this shooting. On appeal, this Honorable Court is implored to follow that same reasoning and deny the Petition for Writ or Certiorari for the frivolous attempt it is.

## CONCLUSION

For the foregoing reasons, Respondents LVMPD, Clark County, and Merl Sage respectfully request this Court deny Petitioner's Petition for Writ of Certiorari and allow the Ninth Circuit decision to stand.

Respectfully submitted this 13th day of November, 1998.

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## RESPONDENTS' SUPPLEMENTAL APPENDIX

Excerpts from Reporter's Transcript of Inquest Proceedings of April 14, 1995 ..... SA 1

Voluntary Statement of Merl Sage ..... SA 52

Voluntary Statement of Margaret Rose Sage ..... SA 61

Voluntary Statement of Janice Cobian ..... SA 68

Voluntary Statement of Carol Jean Ewing ..... SA 73

Voluntary Statement of Billy Mizell ..... SA 80

Dispatch Tape – Las Vegas Metropolitan Police Department Interoffice Memorandum dated March 24, 1995, Event 950321-0292; Subject: Officer Involved Shooting ..... SA 89

Las Vegas Metropolitan Police Department Regulation 5/109.00 re: Use of Force ..... SA 91

Affidavit of R. Paul McCauley, Ph.D. ..... SA 103

Defendants' Answer to Plaintiff's Amended Complaint filed September 17, 1996 ..... SA 109

[p. 1] OFFICE OF THE CORONER

COUNTY OF CLARK, STATE OF NEVADA

Sitting for the Purpose of an Inquest

IN THE MATTER OF THE INQUEST )
OF Anthony Robert Palm, DECEASED. )

REPORTER'S TRANSCRIPT

OF

INQUEST PROCEEDINGS

Before James Ordowski, Esquire
Hearing Officer

Friday, April 14, 1995
9:00 A.M.

Clark County Courthouse
200 South Third Street
Las Vegas, Nevada

Reported by: Jennifer A. Clark
C.C.R. No. 422, RPR

* * *

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[p. 5] LAS VEGAS, CLARK COUNTY, NV, FRIDAY, APRIL 14, 1995
9:00 A.M.

PROCEEDINGS

HEARING OFFICER ORDOWSKI: Good morning, ladies and gentlemen. My name is James Ordowski, and I've been appointed as a hearing officer in this matter. This is a coroner's inquest.

Let me explain to you what a coroner's inquest basically is. You've heard of grand juries that return true bills after listening to evidence. You've heard of a civil jury that returns a liability or nonliability verdict. You've heard of a criminal jury that returns a guilty or not guilty. Well, the coroner's inquest is a very unique feature of the law. It's made up of seven jurors with one alternate, and primarily it is the duty of the coroner's inquest to determine the medical reasons for death of an individual and the circumstances surrounding that death. We really ask the jury to get involved in the questioning because it is the jury's determination.

So with that little overlay, let's go

* * *

[p. 18] A. He didn't want me to go outside, but I wanted to see what was going on. So I opened my front door and –

Q. If I could interrupt for a second. How old is your son?

A. He's 11.

Q. Okay.

A. And I opened the front door, and there were two – I thought they-were boys. I assumed he – you know, he told me they were boys. So there was two boys on the front lawn next door to me, and one had the other one pinned down. And I couldn't quite hear what they were saying. I didn't see any hitting or anything going on, but they were – the one was kind of pleading in a way. The voices were very low.

And I thought it was just two boys fighting, and I thought well, I better call Metro. I don't want to get involved in it because they might harass me. So I watched them for just a few minutes, and in just a few minutes, he pulled down his pants, the boy that was on top.

Q. On March 21st at that time in the morning, what was the lighting condition like?

A. It was – I could see very well. I [p. 19] could see very well.

Q. And the house next door would be the house depicted in the large picture that is next door to where your initials are at?

A. Yes, uh-huh.

Q. You don't know the address of that house off-hand?

A. No, I don't.

Q. Please continue. One of the boys pulled his pants down?

A. And the other one had her pants off. And at that point I could see it was a black man, and he had his pants down to his knees, and they started having sex.

Q. You have indicated now that she had her pants off, and it sort of skipped from two boys fighting to he and she. At what point did you realize that one of the individuals was female?

A. Well, at that point they started having sex, I realized it was a female.

Q. And what – the best that you can recall, would you describe what it is you saw.

A. Well, he just – all I saw is he unbuttoned his pants, and he pulled his pants down to his knees. And I just really got upset at that

* * *

[p. 20] point, and I kind of turned away. And at that time she had her bottoms off, and they started having sex.

Q. Could you hear either of them saying anything?

A. I could hear sounds. I could hear voices, but it was very, very low, and I couldn't really quite hear what they were saying at all.

Q. Did you form an opinion as to whether this was consensual sex or not?

A. I really didn't know. It surprised me so much. I've never seen anything like that before, and it just really

shocked me. And I just really didn't know what was going on.

Q. If I could show you 1 again here. Just to clarify a little for the jury, would you point out – could I get you to come down here for a second, please.

A. Sure.

Q. Could you point out the area where you said you live.

A. Okay. I live right here. This is my driveway right here.

Q. And could you point out the area where this was happening at.

* * *

[p. 22] that photograph; is that correct?

A. Yes, he is.

Q. And it's in front of the same front yard that you've indicated the sex was occurring?

A. Right.

Q. As I left you last, you had turned your head away and was shocked by what you saw. What is the next thing you recall happening?

A. Well, I was – I was going to run in the house and call the police, and my phone line was tied up so I ran back outside again. And just about that time, Officer Sage came running across the street, and he hollered, you know, what are you doing, or get off of her, or something like that.

Q. Did you know Officer Sage?

A. Yes, I know Officer Sage.

Q. Do you know him on a basis other than he's a police officer? Are you social? Do you know him because – in what capacity?

A. No, he's just been my neighbor. I've lived there eight years, and I just know him to wave at him or say hello to him. I don't know him personally. We don't socialize or anything.

Q. Like most neighbors?

A. Right.

[p. 23] Q. Was he in uniform when he left the house?

A. No.

Q. How was he dressed, if you recall?

A. If I remember right, he had a white T-shirt on and Levis, I believe.

Q. And showing you what has been marked as Coroner's 3, do you know the person depicted in that photograph?

A. That's Officer Sage.

Q. And is that the way he appeared to you that morning as far as clothing?

A. Yes, uh-huh.

MR. BOWMAN: Just at your convenience, you might pass that around. Thank you.

Q. When you saw him leave the house, were you aware whether or not he had a weapon, or did you at that point know?

A. I saw him come out of his front door, and he did have a weapon in his hand. And he hollered, like I said, get off of her, or something like that, in a very loud voice.

Q. You could hear it?

A. Oh, yes, I could hear him then. And at that point the boy jumped up off of the girl and [p. 24] pulled his pants up real quick like, and she ran. She was nude from the waist down. She ran towards him, towards Officer Sage, and she was hollering something like – well, he got me – I heard car. I couldn't hear quite what they were all saying, but she was terrified. She ran right towards him.

And at that point the boy just walked right down past the palm tree right down the street and never stopped. He went right towards officer Sage.

Q. How fast was he going toward Officer Sage?

A. He was moving quite fast. He wasn't running or anything, but he was – he never stopped. He just got right up and walked down the grass and walked down the sidewalk right towards him.

Q. What was Officer Sage's reaction?

A. I don't know if he said anything or I couldn't hear, but he shot him twice.

Q. Did you see Officer Sage shoot this individual?

A. Yes, I did.

Q. How far would you say the man was from Officer Sage when Officer Sage shot? If I could, I [p. 25] will walk toward you. Was he closer than this?

A. No, I don't believe he was that close.

Q. Was not as close as I am now?

A. No, I don't think so.

Q. Further back?

A. It's hard to tell from where I was just how close he was, but I believe he was in the street. And like I said, the young man was by the palm tree on the sidewalk advancing towards him.

Q. And when he fell, did he fall in the same position that he's at in the photograph?

A. Yes, he did. He never moved.

Q. Where does Officer Sage live relative to where the man in the photograph is laying on the sidewalk?

A. Probably directly where his feet are pointing, directly across the street.

Q. After the shooting, could you hear any more or did you form an opinion as to the mental state of the female?

A. I never saw her after that. I saw Mrs. Sage come out of the house and bring her some clothing or a blanket or something to cover up because she was completely nude. And I never saw her after that. I don't know what they did with [p. 26] her. I was really upset about it, and I don't know whether – I think they took her across the street and covered her up.

Q. You never heard her say anything else either?

A. No, I didn't.

Q. And what do you recall happening after that?

A. Immediately, Metro was there.

Q. Very fast?

A. Very fast.

Q. That location you've described, that's here in Las Vegas?

A. Yes.

Q. Clark County?

A. Uh-huh.

MR. BOWMAN: Mr. Ordowski, I don't believe I have anything additional of this witness.

HEARING OFFICER ORDOWSKI: Mrs. Ewing, you indicated that after the sexual act and Officer Sage had come out that she – quote, she was terrified. You're referring to the woman?

THE WITNESS: Yes.

HEARING OFFICER ORDOWSKI: What do you [p. 27] base that statement on? What were her outward manifestations of action?

THE WITNESS: As soon as the young man got off the top of her, she jumped up immediately and was just terrified, the way she reacted. She ran towards –

HEARING OFFICER ORDOWSKI: What was her facial expression?

THE WITNESS: I don't know because they had their back towards me. I don't know.

HEARING OFFICER ORDOWSKI: So she was terrified. It was based upon her physical action of running?

THE WITNESS: Right. And she was hollering in a loud voice, just terrified voice is all I could hear. I couldn't really hear exactly word for word what they were saying.

HEARING OFFICER ORDOWSKI: Was it sort of screaming for fear or something?

THE WITNESS: Yes, yes.

HEARING OFFICER ORDOWSKI: Okay. Ladies and gentlemen, any questions?

JUROR NO. 614: Did the young man have a weapon in his hand when the officer shot him?

THE WITNESS: I never saw anything. I [p. 28] never say any weapon or anything. If he did, he had it in his pants pocket or whatever. I don't know. I never saw anything.

JUROR NO. 612: Did the young man and Officer Sage have anything to say to one another?

THE WITNESS: I didn't hear that either. Like I say, it was quite a ways, and I couldn't hear. I heard voices, but I couldn't understand what they were saying.

HEARING OFFICER ORDOWSKI: Yes, ma'am.

JUROR NO. 619: When your son first heard this occur, was it because he heard the girl resisting or running from him or caught her in that yard? Do you happen to know anything about that?

THE WITNESS: All he said to me was he came down and he says mom, there's boys fighting out in the front lawn. He said they woke me up.

JUROR NO. 619: So there was screaming or hollering?

THE WITNESS: That's when he came downstairs and told me.

HEARING OFFICER ORDOWSKI: Let's just go on a little further. That's a good point. The juror is questioning whether or not there was an actual fight between these two individuals. Now we [p. 29] know they are male and female. Did you see either of them swinging their arms or anything to indicate a fight?

THE WITNESS: When I looked out the front door and stood there, he had her pinned down with both arms.

HEARING OFFICER ORDOWSKI: Was the man physically holding the female to the ground?

THE WITNESS: Yes, he was.

HEARING OFFICER ORDOWSKI: Was he holding her to the ground when he removed his trousers?

THE WITNESS: He had her down on the ground and he held – his right hand was down. His left hand – I saw him make a motion towards his – you know,

his side, and I thought well, maybe he's getting a weapon or something, you know. And I didn't know quite what to do at that point. And at that time is when he pulled his trousers down.

HEARING OFFICER ORDOWSKI: So simultaneously with holding her down he was removing his trousers?

THE WITNESS: Yes, uh-huh.

HEARING OFFICER ORDOWSKI: Had her skirt and pants already been removed at that time?

[p. 30] THE WITNESS: I don't think so. I don't know what she had on. She was kind of buried in the grass a little bit. And the grass was high, and I couldn't really see. I think I kind of turned my head, but when I turned back, that's when, you know, they starting having intercourse.

HEARING OFFICER ORDOWSKI: But it is your specific recollection and testimony those two people were fighting on that morning; is that right?

THE WITNESS: Yes.

HEARING OFFICER ORDOWSKI: Does that help you? Yes.

JUROR NO. 609: Just for clarification, when your son reported, he did report two. There was no possibility of a third person?

THE WITNESS: No, no. And when I looked out, there were only two.

JUROR NO. 618: Did the woman live in the house in back of that yard where they were? Was that her home?

THE WITNESS: No, no. She lived –

JUROR NO. 618: Did he bring her there?

THE WITNESS: No. As far as I know, she was walking.

* * *

[p. 34] Q. At about 6:00 o'clock in the morning, did anything unusual occur?

A. Yeah. I was awakened by a loud commotion outside.

Q. Describe the commotion.

A. Just like a loud talking argument or something.

Q. What did you do?

A. Just had got up and looked out the window, because a couple weeks earlier I had heard the same thing, I thought. And I just looked out the window to see what was going on. I had looked two weeks before and didn't see anybody.

Q. What did you see?

A. At first I didn't see anyone. I kept looking and looked off to the side and saw two people in the next door yard.

Q. What were they doing?

A. It just looked like two teenagers wrestling on the ground.

Q. What happened then?

A. I stood and watched for about five minutes and was about ready to call the police just to have somebody come back with the commotion. And

* * *

[p. 37] (Audio tape was played.)

MR. THOMPSON:

Q. Mr. Mizell, describe for us again what you saw when the officer walked up with the gun in his hand. Tell us as best you can recall what he did. Could you hear him saying anything?

A. I could hear him saying illegible but couldn't distinguish the words illegible him speaking, and as he spoke, immediately the black guy jumped up to his feet and pulled his pants up and, like stepped over onto the sidewalk, which was, like, three or four feet away.

Q. What did he do then?

A. When he got the sidewalk, he immediately moved towards the policeman.

Q. Would you describe it as a lunge or rush or –

A. Well, I can't safely say because there was a palm tree he moved across – behind as he went. I just know he made a movement towards him.

Q. Did you have occasion to see the woman who you explained was being raped at a later time that morning?

A. When I had hung up with the dispatcher, I immediately ran down myself and ran out there to [p. 38]

where the policeman was, and the woman was sitting, like, on the other side of a bush on the sidewalk there with the policeman's wife there.

Q. Describe her appearance.

A. Her face was beat up pretty good. She was bleeding all the way around the mouth. It was all busted, and just the rest of her face was just, like, all red at the time. You could tell she'd been hit a few times.

Q. What was her demeanor like?

A. She was just sitting there sobbing.

Q. She was crying?

A. Yeah. She was crying uncontrollably at the time, it looked like.

Q. Uncontrollable crying?

A. Yeah.

Q. Could you tell before the officer got there had she been held on the ground or could you tell that?

A. Well, the time I was watching the guy – that's why I thought it was two teenagers. The guy on top was just, like, laying across her just pinning her down. And every time she would try to get up, he would just, like, maneuver around and keep her from getting up. But I never saw any

* * *

[p. 45] Q. Where did you live, Miss Woodall?

A. I'm residing at my girlfriend's house.

Q. And what part of Las Vegas is that?

A. Boulder Highway. Down Boulder Highway.

Q. How long have you been living there?

A. I don't know. A few months.

Q. Were you living there on March 21st of this year?

A. Yeah.

Q. In the early morning hours of March 21st of this year, what were you doing?

A. I was taking a walk.

Q. Where did you walk?

A. I walked from her house up Tropicana, across Mountain Vista, and up some side street in a residential area.

Q. Did anything unusual happen during this walk?

A. Yes. I was followed and bothered by a black boy in a car.

Q. Describe where you were when you first saw this car.

A. The corner of Mountain Vista and Tropicana.

Q. What was the car doing?

[p. 46] A. Passing me.

Q. Did you notice anybody in the car?

A. Yeah. He kept stopping and honking his horn trying to get my attention. I ignored him.

Q. Okay. You were walking, you say?

A. Uh-huh.

Q. What were you wearing?

A. A pair of jeans, a shirt, a headset radio set, my purse.

Q. Earphones?

A. Uh-huh.

Q. But you could hear the horn honking?

A. Yeah. I just ignored it.

Q. What happened next?

A. Just kept doing it. Finally I pulled my earphones off and told him to leave me alone. I didn't want no ride. Just leave me alone.

Q. Could you describe the car that he was driving?

A. A little silver car. That's all I know.

Q. And what happened after that?

A. The same thing. He kept doing it, kept following me, kept going up the street and as I crossed the street there.

Q. What did you do?

[p. 47] A. I told him to leave me alone. Just leave me alone.

Q. Did he leave you alone?

A. No. He wouldn't stop, so I went down the street one more time. I got off of Mountain Vista, and I went up a residential street.

Q. What street was that?

A. I don't know.

Q. Would you know it if you saw an aerial photograph of the area?

A. I don't know that either.

Q. Okay. Let me show you Coroner's Exhibit Number 1 and see if you can recognize this area there.

A. Yeah. I was right there.

Q. You were coming down this street here?

A. I was going – I was going up a street, and as I came around the corner, it turned into a complete circle to go down another street.

Q. Okay. And do you remember this particular area as part of your walk?

A. I don't remember. I just remember the street, looking at the street. I wasn't looking at homes, houses.

Q. Okay. What happened next?

[p. 48] A. As I got around the corner, I was seeing that it was going all the way around to where I'd have to come back down, and I noticed a silver car parked right on the side, the other – opposite side of the street of me. And then I noticed that he was walking across the street kitty-corner. So I kept going up toward the closest yard. And I told him I was going to call the police, and he grabbed me.

Q. Now, let me show you this same photograph and see if the car at the top of this photograph is the silver car you're talking about. Is that the one?

A. Yeah, it could be it. I thought it was a little lighter, but yeah, that could be it. Like I said, I wasn't really –

Q. I'm pointing to this car at the top. Now tell us again what happened. After you saw that car, what did he do?

A. He was walking across the street kitty-corner from his car and, like, not even looking at me. And I kept walking up to the first house on the right. And I started crossing to the yard, and I told him to just leave me alone or I'm going to call the police, and that's when he [p. 49] grabbed me.

Q. Did he say anything to you?

A. No. He just grabbed me and threw me to the ground and started punching me.

Q. Describe him.

A. Pardon me?

Q. Describe him, please.

A. Describe – what do you mean?

Q. What did he look like?

A. He was tall, slim, black, short hair, clean face.

Q. Do you remember what he was wearing?

A. No, not really.

Q. You say he just grabbed you and started punching you?

A. He grabbed me and threw me to the ground and started punching me.

Q. Where did he hit you?

A. In the face, in the head.

Q. How many times?

A. I don't know.

Q. Many times?

A. As many times as I'd let him. We were wrestling. We were fighting.

Q. What did he say then? Anything?

[p. 50] A. No, not –

Q. Did you make any noise?

A. I was screaming my head off. That's why he grabbed me by the throat.

Q. He grabbed you by the throat?

A. Uh-huh.

Q. What happened then?

A. I lost all control. He grabbed in the inside of my throat and – just choking me, trying – he was choking me.

Q. How long did he continue to choke you?

A. Long enough to where I knew I was dying.

Q. You thought you were going to die?

A. Oh, definitely.

Q. Did he ever say anything to you?

A. He said something, but I can't really remember what it was. I really can't.

Q. After he beat you and choked you, what did he do?

A. That was just – he never stopped, okay. He was raping me.

Q. Did he remove your pants?

A. Yes, he did.

Q. How did he remove your pants?

[p. 51] A. With one hand while he was choking me. I told you, I was almost gone. I was going out.

Q. And you had Levis on?

A. Uh-huh.

Q. Did you have underpants on?

A. Yes, I did. I thought I did. I was told they couldn't find them.

Q. He removed your pants and, if you had underpants, those too?

A. He just jerked my pants down with one arm and put his foot in between the crotch and shoved. Yes, he pulled my pants off.

Q. And he sexually assault you?

A. Yes, he did.

Q. He placed his penis in your vagina?

A. Yes, he did.

Q. And did he do that repeatedly over a period of time?

A. I beg your pardon?

Q. He did that more than once?

A. I think it only takes once.

Q. Okay. At some point did you sort of relax and – to avoid being choked anymore?

A. Yes, I did. I noticed there was a cross – I was looking to the side, and I noticed [p. 52] across the street there was a two-story house with windows open at the top. And I thought if I went along with it, I thought it would be okay. I thought I saw somebody in the window, and I would tell them that he was my boyfriend if he would get caught or something. And that was when I noticed somebody standing in the corner of my eye, which was I guess the police officer.

Q. You noticed a man with a gun?

A. Yes.

Q. What happened after you noticed the man with the gun?

A. He shouted something like what are you doing or get off of her. And I said please help me. And the guy got up off me, and then I got up and started to run towards the police officer. And he told me to get down and get over because he didn't know who I was, I guess.

And I immediately went down to the sidewalk, and I was crying uncontrollably. And I wasn't looking at anybody, just sort of looking in between the officer and the guy. I was just staring off into space, and I saw a flash out of the side of my eye, somebody moving real fast. And

then I heard two shots, and then somebody was [p. 53] coming across the street with a blanket, and then there was an ambulance and police.

Q. You saw a flash of movement?

A. Yes.

Q. Just before the shots?

A. Yes.

Q. That flash of movement was the man that had been raping you?

A. Yes.

Q. And then you immediately heard two shots?

A. Uh-huh.

Q. What would have happened if the officer hadn't intervened?

A. I'd be dead.

Q. I'm going to show you three photographs. These are Coroner's Exhibits 6, 5, and 4.

A. Jesus Christ.

Q. Can you identify these as pictures of yourself taken that day or that evening?

A. Yes, yes.

MR. THOMPSON: May I pass these to the jury?

HEARING OFFICER ORDOWSKI: Yes.

* * *

[p. 56] pen and put your initials there. Could you just initial your house?

A. (Witness complies.)

Q. Do you know where Officer Merl Sage lives?

A. Next door.

Q. So you live right next door to the officer. Do you know Officer Sage and his wife?

A. Yes.

Q. Have you known them for some time?

A. About a year.

Q. Now, on that particular morning, did something unusual happen?

A. Yes.

Q. What we want you to do now is tell the jury what happened and what's the first thing you recall that drew your attention to something happening.

A. I heard a car door slam, and I didn't get out of my bed until I heard a woman scream.

Q. Could you tell what the woman was screaming?

A. She was yelling help and get off of me.

Q. I assume that there's more than you that live at that house.

[p. 57] A. Yes.

Q. Was your bedroom in an area where you could see and hear what was going on?

A. My window faces the street.

Q. I see. So you heard a woman calling for help or screaming?

A. Yes.

Q. And so you got up.

A. Yes.

Q. What did you see?

A. Across the street on the lawn, I saw a woman on the lawn, and a man on top of her hitting her.

Q. Could you describe these two people for us.

A. The woman was white, and she was a bit overweight. And the man was black, and he was kind of skinny.

Q. Was he on top of her?

A. Yes.

Q. Could you see him hitting her?

A. Yes. He was punching her in the face and on the head.

Q. Could you give us an idea of how many times you saw him hit her?

* * *

[p. 73] A. Yes.

Q. And where is that?

A. Right here.

Q. Could you come down and point this out for the jury. I believe this is sort of important for us.

And this is where you and your husband Merl Sage reside?

A. The house is right there.

Q. Right here?

A. Yes.

Q. Okay. You could have a seat. I'd like you to recall, if you could, the morning of March 21st around 6:00 in the morning. Were you at home?

A. Yes.

Q. Were you asleep?

A. Yes.

Q. Was your husband also at home?

A. Yes.

Q. Did there come a time that morning that somebody woke you up?

A. Yes.

Q. Would you tell the jury what you first saw or heard that drew your attention.

[p. 74] A. I woke up to the sound of what I believed to be screams, yells of help.

Q. Could you tell where it was coming from?

A. I thought it was coming from out in front of the house.

Q. And as a result of what you heard, what did you do?

A. Well, Merl woke up at the same time. So we just looked at each other, and I stayed in bed, and Merl went out into the back of the house. And when I realized he went out to the back of the house, I got up and then said to him honey, I think it's in the front.

Q. Did he then go toward the front of the house?

A. Right. Then he went to the picture window.

Q. Do you, in fact, have a picture window or windows that face the street?

A. Yes.

Q. And that's where he went?

A. Right.

Q. From that vantage point, could one see across the street where the sounds were coming from?

[p. 75] A. Yes.

Q. And what is the next thing you recall after he then proceeded to the front of the house?

A. After he went to the front of the house he started looking out of the picture window. I just kind of looked over his head, and I said what's going on? And he said well, I think there's a couple guys out there tussling

before they're going to school or something. And he said go on back to bed. I'm handling this.

So I said okay. And I went back into the bedroom, and I looked out the bedroom window. And at that time I could see this – what appeared to be a black man beating on a person. At that time I couldn't exactly tell that it was a woman, although I thought the screams were those of a woman. And I witnessed a choking motion that he was doing on the person on the ground and – until she went limp.

When she went limp, I then saw him remove her jeans, and at that time he kind of slid her further down on to the grass so I could really see, because they were behind some bushes initially. Then I saw him pull down his pants, make a motion toward his trunk, and then get on top [p. 76] of her.

Q. What was your husband doing during this time?

A. He was still looking out through the living room window.

Q. And did there come a time you decided that Metro should be called or did he or what?

A. Well, as soon as I realized what was happening here, I then – the bedroom window is open, so I didn't want to be real loud. I was afraid of what else – he might kill her at that point. So I ran in the living room, and I said Merl, get in here right now. You can't see from where you're looking from. I believe this is a rape.

So Merl came into the bedroom. He grabbed his binoculars and he spread the blinds – or I spread the

blinds so he could look through with the binoculars so he could see what is happening.

Q. When he got his binoculars and you're holding the blinds open, has the individual already removed her pants and his pants?

A. Yes.

Q. And what is occurring at this point?

* * *

[p. 78] and got the phone. He said he wanted to make the 911 call because he is a Police officer and figured he could get through the system a lot faster than if I was trying to report the rape.

Q. Regarding the 911 call, is it not true that both yourself and your husband participated in that call?

A. Yes, that's correct.

Q. He initiated the call?

A. Right.

Q. And then he left and you took over the call?

A. Right.

Q. Have you had occasion to hear the cassette tape-recorded 911 call?

A. Yes.

Q. And does that tape-recorded call that we've played for the jury already, in your recollection, is that an accurate portrayal of what you recall saying and the 911 operator saying?

A. Yes.

Q. And so your husband places the call, and what does he tell the operator as you recall?

A. He was telling them that he was a traffic officer and that they were asking him [p. 79] questions about – I mean, I could tell by the response that he wasn't getting through as quickly as he would have liked. He repeated who he was. He gave his P number, and he got very frustrated because he felt as though he couldn't get through quick enough.

And I said here, give me the phone. I said I'll continue. You need to get out there. So that's exactly what we did. And then I took over the call and identified myself.

Q. How was your husband dressed?

A. At the time that he was speaking to them?

Q. At the time he was speaking.

A. At the time he was speaking, he had his underwear on.

Q. And at the time he left the house?

A. He had put his jeans on.

Q. Did he have any type of shirt or upper wear?

A. T-shirt, white T-shirt.

Q. Did he have a weapon at the time he left the house?

A. Yes.

Q. And where did he obtain that weapon [p. 80] from?

A. From the nightstand. He keeps his gun on the nightstand at night.

Q. Did you see him grab the weapon?

A. Yes.

Q. You are still talking to the 911 operator. Are you still looking out the window?

A. Not while he was. – I wasn't looking out the window at that time, no.

Q. Did you return to the window?

A. Yes.

Q. As your husband left the house, did you return to the window?

A. Yes, I returned to the window.

Q. Would you tell us what you saw and heard from that moment on.

A. Sure. I saw him go across the street. I heard him yell something. I could not make out the words that he was saying, but I heard him yelling at the man. And Merl was pointing the gun at him.

And as the guy looked at him and then he drew himself off of the lady, and it looked like he was just going to pull up his pants and that would have been the end of it. But instead he pulled up [p. 81] his pants and at the same time started to lunge right at Merl. And it had kind of an acceleration because there's a little bank on the grass. So by the time he got from the grass, it was like two steps and he was on the sidewalk. And at that time then Merl fired two shots.

Q. I'd like to get a feel for how far, if you know – and I don't know if you could see from where you were at, but do you have an opinion how far the individual was from your husband when your husband shot?

A. I'm guesstimating he was about 10 or – when he started the lunging maneuver, he was about 10 or 12 feet away. And by the time – two steps – he closed in, he was about five or six – about half the distance.

Q. I see. Could you tell whether or not this person had been hit?

A. Yes.

Q. And your opinion was he had been hit?

A. Yes, because I saw him go backward and then just fall flat back.

Q. You have indicated you heard two shots?

A. Yes.

Q. How far apart were these two shots?

* * *

[p. 87] THE WITNESS: No. I never heard a sound from him.

HEARING OFFICER ORDOWSKI: Let's follow that other train of thought a minute. It was your impression that the black man, the decedent, was trying to – intended to tackle your husband?

THE WITNESS: Yes.

HEARING OFFICER ORDOWSKI: What do you base that on?

THE WITNESS: The way he was – the way he was lunging. It's kind of like – may I stand?

HEARING OFFICER ORDOWSKI: Sure. Absolutely.

THE WITNESS: I'll show you. The thing of it is when he got off – he slid off of her and he bent over to pull up his pants and just – if you've ever seen a football player tackle someone, they tackle for the legs. It looks like he was going low but just making that accelerated motion.

HEARING OFFICER ORDOWSKI: Does that help you out?

THE WITNESS: Does that make more sense?

HEARING OFFICER ORDOWSKI: Yes, sir.

JUROR NO. 609: Did the officer request

* * *

[p. 93] THE WITNESS: Dr. Robert Jordan, J-o-r-d-a-n.

EXAMINATION

BY MR. THOMPSON:

Q. For whom are you employed, Dr. Jordan?

A. The office of the Coroner Medical Examiner of Clark County.

Q. You are a medical doctor?

A. Yes.

Q. Describe your training and background briefly for us.

A. I have a combined M.D. Ph.D. degree, four years of pathology residency, about 30 years experience, and am board certified in anatomic, clinical, and forensic pathology.

Q. What is forensic pathology?

A. Forensic pathology is the application of laboratory medicine to the law.

Q. And what do you do for Clark County?

A. I perform autopsies on various decedents in Clark County to determine the cause and manner of death.

Q. Were you so employed on the 21st day of March of this year?

* * *

[p. 96] officer and shot.

Q. Did Dr. Green conduct an external examination of Mr. Palm?

A. He did.

Q. Tell us what that resulted in.

A. Essentially, Mr. Palm was a well developed, well nourished Afro-American male. He appeared to be approximately the stated age of 21 years. He weighed approximately 145 pounds and measured about five feet nine inches in height. The external examination revealed no evidence of natural disease. He had a scar on his

forehead and two gunshot wounds to the upper right chest.

Q. Was an internal examination performed?

A. Yes, sir.

Q. Describe the results of that internal examination.

A. Internally he had blood in both sides of the chest which had gotten there because of some damaged blood vessels. He had a little blood in the abdomen, and there appeared, again, to be no signs of natural disease which may have affected his life span.

It appeared that the two projectiles, the entrance wounds of which were present on the [p. 97] upper right chest, had tracked similarly from right to left and downward and in doing so went through the heart, the lung, the stomach, the diaphragm and the spinal column, lodging on the left side of the body, both subcutaneously on the chest and within the abdominal cavity. There was very little blood in the abdomen but a considerable amount in the chest.

Q. Was an x-ray taken of the chest, Dr. Jordan?

A. Yes, sir.

Q. I'll show you what's been marked Exhibit 7. Can you identify that?

A. Exhibit Number 7 is what we call an AP chest, anteroposterior shot from the front to the back of Mr. Palm showing two distorted projectiles over on the left side of the chest and the abdomen. These were recovered at the autopsy.

MR. THOMPSON: May I exhibit that to the jury?

HEARING OFFICER ORDOWSKI: Yes.

MR. THOMPSON:

Q. Now describe with some more specificity by pointing to yourself the entrance wounds of these projectiles and the trajectory of these [p. 98] projectiles.

A. The most anterior or the front shot was approximately here (indicating) in the right chest. The second shot appeared to be slightly in back of the plane of the shoulder, and both of these projectiles tracked downward. They went from head to toe through the chest, across the middle of the body within the chest, and one of them went into the abdomen, and the other lodged over here on, the left chest. The other one was a little lower than that, so they both followed essentially the same path from right to left, downward and slightly front to back.

Q. Now, is that consistent with a man who was shooting holding a gun and Mr. Palm in a bent or lunging position such as this?

A. It is.

Q. What was the cause of death?

A. Dr. Green's opinion, Mr. Palm died as a result of two gunshot wounds to the chest.

Q. Were certain analyses done on the blood of Mr. Palm as part of this procedure?

A. A sample of blood was submitted to the laboratory for testing for drugs. The report showed that there

was a level of alcohol of .250, [p. 99] and no other drugs were detected.

Q. What does that .250 indicate in terms of the level of alcohol for, for example, driving under the influence or alcohol?

A. DUI is the only standard we have to measure to compare alcohol levels against, and in the State of Nevada, a level of .1 is considered to be DUI.

Q. Mr. Palm was .25, correct, which is more than twice that particular level.

You talked about the two projectiles and you seemed to indicate that one of them may have been fired first and then the other one second. Is that because of their entrance? Can you tell which one was fired first?

A. Not exactly.

Q. If he was in a lunging position of some sort, would it be consistent that the one fired this way into the chest first and the one into the shoulder second as he was going down?

A. That's possible, yes.

MR. THOMPSON: I don't think I have any further questions.

HEARING OFFICER ORDOWSKI: Dr. Jordan, there was some written questions sent up here by

* * *

[p. 108] general as well as that particular weapon?

A. Yes, I am.

Q. To what extent?

A. I am also – along with my duties as a police officer in the traffic division, I am a firearms instructor and, for the past four and a half, five years, have helped teach the academy students when the academy is in progress.

Q. And you have then, within the statutory guidelines of the Metropolitan Police Department, qualified with that weapon often enough and as recently enough to allow you to carry it?

A. Yes.

Q. Let's talk about the 21st day of March of this year. Had you gone to bed about 2:20 in the morning, thereabouts?

A. Yes, sir.

Q. And there came a time when you were awakened?

A. Yes.

Q. Would you tell us what you recall hearing or seeing or what it was that woke you up.

A. I awoke to the sounds of what I thought – a commotion, muffled sounds of what I thought someone was fighting. Muffled sounds. I [p. 109] could hear the hits which we later found to be hits, and I got up out of bed.

And not knowing from which direction it came from, I left the bedroom and went out to the – through the living room and towards the back of the house, which was opposite from where this was occurring. I opened the french doors and I looked out back thinking that the noises

were coming from the back street which runs alongside the back of the house. When I realized that this was not where it was occurring, I walked back into the residence.

And my wife, who was in the master bedroom, was looking out the window, and she told me, she said I think it's out front of the house. I went into the master bedroom and I looked through the window, which is looking east from the front of the house, and I could see just partially the lower portion of someone wrestling on the grass and what appeared to be someone fighting and struggling.

At this time I still couldn't figure out what was going on, so I walked back into the master – or I walked out of the bedroom, went into the living room to try and get a different angle. Now, there was some shrubbery about two feet high [p. 110] which was keeping my view from the people that were fighting, wrestling around. I looked through the picture window, and still not being able to see entirely what was going on, I could still only see the lower portion of what I thought was a male person. At this time I thought it was couple of kids fighting or wrestling because at that time in the morning, several kids are going to school, and they walk to school from that area.

My wife, who was still in the master bedroom, said to me that she could get a better angle. And I don't know how much time had gone by. It wasn't very long, but I turned around, and while I'm not looking or while I – I'm looking through the picture window in the livingroom, she tells me that – she said something like my God, it's a rape. There's a woman being raped there. There's a man raping a woman.

Now I walked into the dining room, picked up a pair of binoculars which I have on top of a computer shelf, and I took those binoculars, went into the master bedroom, and went back to the window. And she opened the curtains for me, and I looked with my binoculars so I could perhaps get a better view of what was going on.

* * *

[p. 113] that was occurring between the suspect and the victim was right here behind these bushes, and this is my residence right here. The master bedroom is right here. The window and the living room window is right here from also which I was looking out of that.

Q. Thank you, Officer. If you'd take a seat again, please.

A. (Witness complies.)

Q. Now, having seen what you've described to us through the binoculars, what's the next thing you recall happening?

A. At this time I grabbed my Levi pants, blue Levis, at the same time grabbed my gun, my Beretta .40 caliber, which I keep alongside the nightstand alongside my bed. And with my gun and trying to get my pants on at the same time, because I now have identified what exactly is going on, I also grabbed the telephone, the portable telephone, and I dialed 911. Trying to talk to the dispatcher at the same time, get my pants on at the same time, and collect my thoughts as to what I'm going to do, I finally got dressed with my pants and I was wearing a white T-shirt.

And the dispatcher started to ask me [p. 114] several questions, and I realized that it was taking a little bit longer than what I wanted to so I gave the phone to my wife to continue with the dispatcher. And I told my wife that – I said tell the dispatcher I'm in blue Levis, a white T-shirt, and I have my gun, and I'm going outside right now.

Q. Is that the gun that you've identified for us here in court?

A. Yes, it is.

Q. And having given the phone to your wife, what did you do?

A. I went downstairs, opened the front door, and I ran across the street to where the suspect and the victim were at this time.

Q. What did you see? What did you see? Describe what you saw as you got there.

A. I got up on the sidewalk. I was approximately 10 to 12 feet from the suspect and the victim, and when I got there, the suspect was in the actual course of sexual assault, of the rape of the victim.

Q. Did you hear either of them saying anything at that point?

A. At that time there was nothing being [p. 115] said by either one of them.

Q. Okay. Please proceed.

A. I do think that the victim was kind of moaning and groaning, but she didn't seem to be moving too much because – just – well, I'll back up a little bit.

When I had looked out the window, I had seen what I later recognized as the suspect beating on her about the face, and she was covered with blood, had a lot of blood about her face and her body. But when I actually got approximately 10 to 12 feet from the suspect and the victim, there was maybe a few moaning and groanings from the victim, but nothing from the suspect himself.

Q. What did you do?

A. I pointed my gun at the suspect, and I yelled at him, I said stop it. Get away from her. Get back. Get back. Get away.

Q. Would you show the jury how you were standing and pointing your gun at this person.

A. Yes. Could I have my – this one is loaded.

I got up on the sidewalk, and I ran up to him and about from here to probably that desk. And I pointed my gun at him, and I was like this [p. 116] here. And I told him to stay back or get back, get away, to get off of her and move back.

And when I said that he immediately he was in the process of the rape portion. He immediately turned his head, snapped his head to the right, and just for that split second just looked at me. And I said get back. Get off of her. Get back. And when he – he immediately started to move backwards, slide down off of her. And –

Q. As he looked at you, officer, and you're standing there with that weapon being held in both your hands, you're not in uniform?

A. No, I was not.

Q. Do you have an opinion – did you have an opinion whether or not he knew you were armed?

A. Oh, yes, he did know. I had it pointed right at him, and he looked right at me as I had my gun pointed at him.

Q. About as far away as we are?

A. Yes.

Q. Please have a seat, if you will. He has now slid off of this female –

HEARING OFFICER ORDOWSKI: For the record, what was that distance?

[p. 117] THE WITNESS: Approximately 10 to 12 feet.

HEARING OFFICER ORDOWSKI: The same as Counsel?

THE WITNESS: Yes, sir.

MR. BOWMAN:

Q. As he then slides off her and sees you. He is aware of your presence.

A. Yes, he is.

Q. What is the next thing that you recall happening?

A. He slid down from her, and in one motion he got into a – came down, got into a kneeling position or squatting position, pulled his pants up with both hands and, when standing up, immediately turned to his right towards me and lunged at me, charged at me.

Q. How much time would you estimate between the time that you told him to get off, get off, stop it, and the time that he lunged at you?

A. Just a couple seconds from the time I first told him to get back or get off the victim. And then when he slid down, I started to move up, it was like that.

Q. At this time you are now dressed in [p. 118] jeans and a T-shirt?

A. Yes.

Q. Did you tell him that you were a police officer?

A. No, I did not.

Q. Did it occur to you that you should?

A. Well, I meant to. I guess I didn't because I'm normally in uniform all the time. And so when I stop somebody or whatever I'm doing at work, I'm in uniform. People know who I am. And I thought – I did think to myself, geez, I probably should tell him who I am, but I had already commanded him to move off of the victim and to get back so he could stop what he was doing to the victim. And so I thought I should tell him who I am.

Well, when he got off, he did it all in one motion. He got up, came at me, and I shot him. I didn't have time to tell him who I was as a police officer.

Q. Now, you've started at what you've described at 10 or 12 foot from this man. At the time that you fired your weapon, could you estimate for us how close he was to you?

A. About four to five feet.

[p. 119] Q. He had then cut the distance in half?

A. Yes, he did.

Q. Were you still in the same stance with your weapon at the time you fired it as you were when you showed it just a few minutes ago?

A. Well, when he lunged at me, when he charged at me, he was in a position – if I could show you.

Q. Please.

A. But I did move back a little bit.

Q. Would you show us the position he was in when you shot.

A. The position that he was in, he was on top of the female. I told him to back up, get off of her. And what he did was he came up like this here like so, and he went like this towards me.

Q. You were off to his right?

A. Yes, I was.

Q. And so he was still somewhat crouched at the time that you fired?

A. Yes, he was.

Q. Was he lower than your level?

A. Yes.

Q. Okay. And how were you?

A. When he came at me like I just

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[p. 121] Q. And these were rapid shots? You didn't shoot and then take aim and shoot again?

A. Oh, no. I didn't even aim. I just – well, if you're familiar with firearms – but I mean, he was that close to me. I moved backwards, and I just shot twice. I didn't have time to actually pick up the front sight and aim it, so to speak.

Q. What were you shooting at?

A. I was shooting at center of mass, which is what we are trained to do.

Q. Why are you trained to shoot center mass?

A. We are trained – because we are trained to stop the individual from doing what he was doing or stop him – actually to stop his actions. And you don't want to take the chance of trying to wound somebody by shooting them in the leg or arm for fear the bullet might miss or hit some innocent bystander.

Q. What do you believe – if you've thought of this, what do you believe would have happened had you not shot at that moment?

A. I believe had he charged me successfully, he would have gotten my gun, possibly [p. 122] killed me and the victim.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

EVENT 950321-0282

SPECIFIC CRIME OFFICER INVOLVED SHOOTING

DATE OCCURRED 03/21/95

TIME OCCURRED 0558 HOURS

LOCATION OF OCCURRENCE FRONT OF 4437 DENNIS WAY

CITY OF LAS VEGAS CLARK COUNTY

CAN YOU ID THE SUSPECT

NAME OF PERSON GIVING STATEMENT
MARGARET ROSE SAGE

DOB SOCIAL SECURITY NUMBER
RACE SEX
HEIGHT WEIGHT
HAIR EYES
WORK SCHEDULE DAYS OFF

RESIDENCE ADDRESS 4665 El Cartero Ave., LVN 89121 PHONE

BUSINESS ADDRESS PHONE

BEST PLACE TO CONTACT

BEST TIME TO CONTACT

DETAILS:

This is a taped interview conducted at LVMPD Detective Bureau on 03/21/95 at 0828 hours. This interview is

A: Yes.

Q: Okay, Sgt. Albert would you like to ask any questions?

A: No, I have nothing to add.

Q: Dan Holley?

A: None.

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I HAVE READ THIS STATEMENT CONSISTING OF 7 PAGES AND AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT THE DETECTIVE BUREAU ON THE 21ST DAY OF MARCH, 1995 AT 0847 HOURS.

WITNESS: _____

WITNESS: _____

_____
SIGNATURE OF PERSON GIVING STATEMENT

_____

A: The only thing that comes to my mind is that, um, after realizing that there was a sexual assault in progress and watching the victim being beat very badly that I, I knew there was something I had to do and, and I, I know I had to, uh, do it very quickly.

Q: Okay, and knowing that you're a police officer whether your on or off duty you are required to assist in felony crimes isn't that correct?

A: Yes.

Q: And you're aware of this?

A: Yes I am.

Q: Officer Sage, at any point were you able to identify yourself as a police officer in this incident?

A: Uh, no I did not identify myself, I, I ran over to the scene, uh, I, I told him to get off of her pointing my gun at him and everything happened so rapidly I just, uh, was not able to identify myself as a police officer.

Q: Okay Officer Sage you've worked your entire career as a uniformed officer is that correct?

A: Yes I have.

Q: So normally under your, your enforcement, uh, for enforcement purposes you would normally just confront an individual cause you're in full uniform and there's not a necessity to say I'm a police officer, is that correct?

A: Yes that is true.

Q: And as a detective I'm conditioned to verbally identify myself as a detective cause I'm working plain clothes, could that have anything to do with your not saying verbally I'm a police officer?

A: Yes that's true.

Q: At about what distance is it from your master bedroom window to the crime scene itself?

A: I would say about a hundred feet.

Q: Okay and when you confronted him were you on the sidewalk or actually on the lawn where the crime was going on?

A: I was on the sidewalk and the crime was occurring on the grass, the lawn at that corner residence.

Q: Okay, so the individual is quite close to the sidewalk itself there on an angle on the corner there?

A: He was approximately, uh, six feet from the edge of the sidewalk.

Q: Okay and your Baretta, 40 caliber, ejects to the right doesn't it?

A: Yes it does.

Q: So where the shell casings are would give us an idea by the ejection of, of where you were standing?

A: Yes.

Q: And did he fall immediately or did he step back and collapse?

A: He, uh, stepped back about, uh, one, two steps and fell straight backwards landing on his back on the sidewalk.

Q: Okay so it would indicate that he was within five to ten feet of you when you shot him?

A: Yes that's approximate.

Q: Okay, is there anything you'd like to add to this statement that might assist us in investigation of this incident?

Q: Okay, does Carol Ewing know that you're a police officer?

A: Yes she does.

Q: Cause you work Traffic and come to and from work in your motorcycle, is there any doubt that of whether any of the other neighbors knows that your a police officer?

A: No, they all know I am a police officer.

Q: How long have you lived in that area?

A: I've been at that residence for, uh, nearly thirteen years.

Q: Okay, Merl is there any doubt in your mind that this young lady's life was in direct and eminent danger when you confronted this suspect?

A: No there's no doubt in my mind whatsoever. I knew that this lady was in trouble and by her screams and watching him beating on her and the sexual assault at the same time, I knew I had to do something. I felt truly that her life was in danger.

Q: Okay, other than this individual's aggressive actions towards you, did he say anything or did he growl or scream or do anything that would indicate he might be under the influence of drugs or anything?

A: No he did not.

Q: Okay and this happened at right about 6 a.m. It was daylight at that time wasn't it?

A: Yes it was daylight.

Q: And the only thing obstructing your view of the entire crime is the evergreen shrubs on the corner there between your residence and where the crime was occurring?

A: Uh, yes it was. He, as he, when he got up, he pulled his pants up at the same time and then one, the same movement or the same motion, pulling his pants up at the same time and moving towards me.

Q: Okay, could you see in [sic] he had anything in his hands or if he had anything on him at all? Did it appear he had a weapon or did he appear that he was reaching to grab at you at that time?

A: I did not notice any weapons but it appeared to me that he was coming towards me in an aggressive manner and it was very sudden, very, very rapid.

Q: Okay so you're firing on him as a reaction to his actions towards you.

A: Yes that's true.

Q: Was there any doubt in your mind that he was about to attack ya?

A: No there was no doubt in my mind whatsoever.

Q: Okay, during the time that he was standing up and pulling on his trousers, was the female saying anything or doing anything?

A: At that time, immediately the female, who was lying on the ground, jumped up and came to me and said, "Oh thank God, thank God you saved my life, he was gonna kill me."

Q: Okay, and do you know if any of your neighbors witnessed this incident? Were there any neighbors coming out of their residences at the time cause of the screaming?

A: Uh, right after the shots were fired, there was a lady who is known to me by the name of Carol Ewing who lives in the house, uh, just east of the rape scene came out and said has anybody called the cops and I told her, uh, my wife was on the phone at this time.

knee, about at his knees and, uh, it was at this point I, I realized that there was a rape in progress, uh, sexual assault. I, uh, went into the living room, picked up the telephone and, uh, dialed 911 and at the same time I'm trying to get my, my pants on myself, my Levi's because all I was in was my underwear. Um, I dialed 911, advised the dispatcher of who I was, I stated to her that a rape was in progress at the 4400 block of Dennis Way and, uh, she asked me where I worked, asked me what my P number was. I gave her the information, I could still hear the yelling going on outside and I realized that I had to get outside and do something at this point because as I had stated earlier, there was a rape in progress and she was still screaming. It was pretty loud and it was very, very noticeable. I had my a, my gun which is my duty firearm which I carry on duty and, uh, I had at this time my Levi's and I was wearing a white T-shirt. I gave the phone to my wife, I went downstairs, opened the door and I ran over to the, uh, to the suspect and, and the, well, to, to the incident, to the scene which was, uh, across the street. At this time, as I got there, the, uh, black male was, uh, sexually assaulting the female. She was still trying to struggle, uh, moving back and forth, rolling on the grass, uh, from left to right, from side to side, and, uh, he was sexually assaulting her. I yelled at him to get up, um, which he turned and looked at me and saw me. I, uh, pointed my gun at him and told him again, get up, leave her alone, get up. He very quickly got up and at the same time pulled his, his, uh, sweatpants _____ he pulled them straight up and at the same time again took, uh, three, four steps towards me at, uh, which time I shot him twice.

Q: Okay, when he was coming towards you, was it in a real rapid movement, all one movement, coming up pulling the pants on, then lunging at ya?

the bed also. I looked out of the bedroom window and I could see a, uh, what appeared to be a couple of, uh, people on the ground wrestling and fighting. Uh, the one person that was, uh, that I could, I, I could only see half of the, person, uh, that was on top at this time and, uh, as I was looking at him, he was, uh, bringing his right arm, um, and fist and punching, uh, the person that was below him. Um, as he was punching, I could, I could hear the punches hitting the person and the person was screaming. Uh, I still thought it was a couple of, uh, youngsters, uh, possibly on their way to school and, and were fighting. I, still trying to, to get a better view of what was going on so I could make a determination as to really what was happening. I went out into the living room and I, uh, looked through the window and again saw some wrestling and some fighting and all this while there was screaming and yelling by both, both people involved. I still could not determine exactly what was going on and I still at this time thought there was two, two, uh, two males fighting. My wife, who, who was in the bedroom, yelled at me, said come in here I think, uh, I think there's a, a lady, or a female being raped by another, by a man. I went back into the bedroom but this time I, uh, I grabbed my binoculars from, uh, inside the kitchen and I, I went into the bedroom and as she pulled the drapes apart, or the blinds apart, I looked through my binoculars and it was at this time that I realized that it was a female on the ground because I could see her only clad in, uh, black underwear and still the person who was on top, now I realized it was a black male, was still beating her with his right fist and again I could hear the, the, uh, battering as his hand would, uh, would hit the female. I then noticed also that at this time he had pulled his, he was wearing gray sweatpants and he had, uh, pulled them down just, um, about at the

occurring at 4437 Dennis Way, Las Vegas, Clark County, Nevada, on 03/21/95 at 0558 hours. Person being interviewed, Merl Sage, LVMPD Officer assigned Traffic Bureau, P#718. Persons present during interview, Sgt. Curt Albert, Traffic Bureau supervisor, Vice President Dan Holley, LVPPA, person conducting interview Det. D. Hatch P#540, Homicide Section, LVMPD. Deceased suspect, Robert Anthony Palm, BMA, ID number 1080814. Sexual assault victim, Patricia Gail Woodall, WFA, 09/19/56.

Q: Merl, are you aware I'm tape recording this interview?

A: Yes I am.

Q: Merl, it's been determined that earlier this date you discovered a crime in progress at your residence and that you attempted to take action and apprehend an individual involved in a sexual assault, is that correct?

A: Yes, that it [sic] true.

Q: And as an off-duty officer you reported the crime in progress via the 911 emergency number?

A: Yes I did.

Q: And at that point you proceeded to the assistance of this sexual assault victim?

A: Yes I did.

Q: Okay, Merl can you tell us in your own words what you saw and what your actions were earlier this date?

A: Okay, I was, uh, I was asleep and I was a, awakened by a some screaming and some yelling and I, uh, got out of bed and at the same time my wife got out of

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

EVENT 950321-0282

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SPECIFIC CRIME OFFICER INVOLVED SHOOTING

DATE OCCURRED 03/21/95

TIME OCCURRED 0558 HOURS

LOCATION OF OCCURRENCE 4437 DENNIS WAY

CITY OF LAS VEGAS CLARK COUNTY

---

CAN YOU ID THE SUSPECT

NAME OF PERSON GIVING STATEMENT
MERL SAGE, LVMPD OFFICER, P#718

DOB SOCIAL SECURITY NUMBER
RACE SEX
HEIGHT WEIGHT
HAIR EYES
WORK SCHEDULE DAYS OFF

RESIDENCE ADDRESS PHONE

BUSINESS ADDRESS PHONE

BEST PLACE TO CONTACT

BEST TIME TO CONTACT

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DETAILS:

The following is the transcription of a tape-recorded interview conducted on 03/21/95 at 0847 hours. This interview is reference [sic] an Officer Involved Shooting

THE BAILIFF: No.

HEARING OFFICER ORDOWSKI: Let me just go through these again to make sure we've got them all.

THE BAILIFF: There is one.

HEARING OFFICER ORDOWSKI: While in the bent position, could the officer have stopped the attacker without firing?

THE WITNESS: You mean when the suspect was in the bent position?

* * *

THE WITNESS: Yes, I did

HEARING OFFICER ORDOWSKI: And you acted on that basis?

THE WITNESS: Yes, I did.

HEARING OFFICER ORDOWSKI: Any questions? Yes, sir.

JUROR NO. 609: When the suspect – when you first approached the suspect and pointed your gun at him, you say he turned and looked for a few – what appeared to be maybe a second or two. Do you feel that there was without a doubt that he saw the weapon?

THE WITNESS: When I ran up to the suspect where he was with the victim and I yelled at him, he just kind of like snapped his head to [p. 127] the right. And I had my gun pointed to him at that time, and yes, he did see my gun. There's no way he couldn't have.

HEARING OFFICER ORDOWSKI: Yes, ma'am.

JUROR NO. 611: Was the suspect's pants completely on at the time of the shooting?

THE WITNESS: Yes, ma'am. As he got up – as I demonstrated earlier, as he got up, he pulled his pants up the same time and then turned to the right, lunging for me.

JUROR NO. 611: So when he lunged, the pants were completely on?

THE WITNESS: Yes, ma'am.

HEARING OFFICER ORDOWSKI: Mr. Bailiff, are there any written questions?

HEARING OFFICER ORDOWSKI: Any further questions?

Just a little area, Officer. You've explained through your crouching demonstration what the decedent was doing. In his motion towards you, how long would it have taken him to reach you?

THE WITNESS: I don't think it would have been a second. It was just like that.

HEARING OFFICER ORDOWSKI: Now, your frame of mind, you were convinced that this woman had been raped?

THE WITNESS: Yes, sir.

HEARING OFFICER ORDOWSKI: Did you have a – was this man bigger than you in size?

THE WITNESS: Well, he had some bulky clothes on. At that time I thought he was probably about the same size as I was, maybe a little bit thinner.

HEARING OFFICER ORDOWSKI: Okay. Now, the terrain, I've been a little off on the terrain [p. 126] between where he was lurching towards you. Was it solid terrain, uphill, downhill, or what?

THE WITNESS: It's sloped down a little bit towards the sidewalk. There is a little downgrade there.

HEARING OFFICER ORDOWSKI: Did you have an honest conviction and fear –

THE WITNESS: Yes, I did.

HEARING OFFICER ORDOWSKI: – that your life was in physical danger?

Q. Do you think there would have been a physical confrontation? You think he would have not stopped his movements towards you if you hadn't shot?

A. Yes, definitely. He was coming at me. He was coming to charge me for my gun.

Q. What is the next thing you recall happening after the two shots were fired?

A. After the two shots were fired, he – if I can show you again, please. After the two shots, he was in a motion like this coming towards me, okay. He was like this. And now he's about four feet from me. I shot him, and he kind of just stepped back like this here, arms went out like that, and he fell straight backwards on the sidewalk. And that was it.

Q. Okay. Please have a seat.

A. (Witness complies.)

Q. The photographs that we've utilized during this hearing which you have seen the aerial photograph there in which the individual is laying with his arms out, is that the manner in which he fell?

A. Yes, it is.

* * *

[p. 125] was my third one.

MR. BOWMAN:

Q. Officer, in the prior shootings, was anyone killed?

A. No.

reference [sic] an Officer Involved Shooting occurring at 0558 hours, 03/21/95 at front of 4437 Dennis Way, Las Vegas, Clark County, Nevada. Deceased suspect tentatively identified as Robert Anthony Palm, BMA, 21 years of age, ID number 1080814. Officer involved, Traffic Officer Merl Sage, P#718, LVMPD Traffic Bureau. Person being interviewed, Margaret Rose Sage, WFA, 41 years, address 4665 El Cartero Avenue, Las Vegas, Clark County, Nevada 89121. Person conducting interview, Det. D. Hatch P#540, Homicide Section, LVMPD. Present during interview Lt. Ed Jenson, PEAP; Sgt. Curt Albert, Traffic Bureau.

Q: Margaret, are you aware I'm tape recording this interview?

A: Yes.

Q: Margaret it's been determined that you witnessed this incident, is that correct?

A: That's correct.

Q: Margaret, I'd like to have you tell me in your own words how you and your husband came about discovering this crime in progress and what happened.

A: Merl and I were asleep and we were awakened by sounds of someone screaming for help and she just kept screaming help, help, help. Merl got up and he, um, try, trying to look in the, I think he looked out back first, and, cause it was hard to tell where it was coming from and then he looked out front and he, it was difficult for him to see because there, the bushes were there and, and front, and obstructing our view of two people that were obviously having some kind of a tussle and Merl yelled at me telling me to go back to bed he'd handle it and I said okay. So I went up into the bedroom and I looked out the bedroom

window instead and I said, he goes, it's just two boys fighting and I said well I think you can see better in here so, um, and then he's still watching in there. I said Merl I think he's raping her. He goes, no it's a boy. I said no, no I think he's raping her. So Merl came in behind me and grabbed the binoculars and then, so that he could see better because he wanted to be really sure of what's going on before he goes out there and he, um, he could see that indeed her, uh, I had seen too that, um, this was before Merl came in, at one point you could literally see he was choking her and at one point, I couldn't tell, he just, uh, the per, the, she just stopped moving. So I knew at that point she was probably unconscious and, um, then all of a sudden she started moving again and he started pulling her pants down, that's when I realized that what he was trying to do was rape her and that's when I had got Merl and by that time I could literally see him pulling her pants down, his pants were down. He was, in fact, um, in ___ raping her and Merl was overlooking me, he was standing over the top of me with his binoculars. He stopped, he picked up the phone, he called dispatch, um, I could tell he was having trouble getting through to dispatch as far as getting the information across by what he was trying to say. He goes, trying to give the address, she didn't seem to understand what he was telling her. He said his name twice and I said just give me the phone, so, I'll tell her what's going on. So he grabbed his gun, he went out and I, he told me to tell her, he goes tell her I'm going outside with my gun so I did, I told her that and then I said, um, you know, I was trying to give her a description of the suspect just in case he got away and, um, so I was watching. I heard Merl, um, yell and I saw him going across the street rapidly and I heard him yell, yell something but I couldn't make out what it was that

he, he yelled at him and, um, then the guy jumped back. He started to pull up his pants and then he took two steps forward right at Merl and Merl shot him twice. Well, I heard two gunshots.

Q: Okay, can you describe the young lady who was being raped?

A: Um, during or like afterward cause ___.

Q: During and afterwards, can you describe her for me?

A: Um, she's, I thought she was about my age, um, and I'm 41, and she's a, she has like reddish hair, she weighs, uh, ___, height, I guess she'd be about 5'5" maybe a 130 pounds. She's, um, she was, she had a lot of blood all over her face. I noticed she had, um, I had seen, uh, the suspect punch her many, many, many times so I, um, I was trying, I'm a nurse, so I was trying to look for areas where she might be in danger medically as she was hugging and screaming and hysterical. She had a lot of a bruises around her neck. She had tenderness in her head area but she was awake, alert all, the entire time. She, I was trying to get some information from her she said that her name was Patricia, I forgot what she said her last name was, but I said is that what people call you and she said no people call me Red. So I started calling her Red trying to calm her down. She wanted to, um, to go after you know, Merl, he saved me, he saved my life that man there he saved my life. I said to her no I said you saved your life you yelled for help and that's how you saved your life. I said he just came out cause you yelled and, um, you know she's . . .

Q: Could you hear what she was screaming other than just screaming. Was she saying he raped me or anything at all when you talked to her?

A: All I remember is hearing her yell help, help, stop that, stop it, that sort of thing. I, I don't know if I can

recall ever hearing her yell rape. I mean, I didn't really need to all I heard is her yell and I could see him doing it . . .

Q: Okay was she, was she still partially clothed when you got . . .

A: Yeah.

Q: From your house to the scene?

A: Yeah, she just, she just had her tops on.

Q: Okay and your residence is the two story residence on the corner of Dennis and El Cordero?

A: Yes.

Q: And this happened across the street on the corner residence of El El [sic] Cordero . . .

A: Dennis Way.

Q: El Cordero and Dennis Way?

A: Yes.

Q: So it's the width of the street plus your yard width from where the incident was occurring?

A: Um hmm, yes.

Q: And about how far do you think that is?

A: I'm not real good at guessing.

Q: Okay.

A: I don't know, I don't even know the street width.

Q: Okay, I, the reason I'm establishing this is it's daylight . . .

A: Yeah.

Q: It's early morning hours and you could see from your bedroom window what was going on?

A: Yes.

Q: And there was no doubt that he was sexually assaulting her?

A: No doubt whatsoever.

Q: And there was no doubt that he was beating her rather severely and choking her at the same time?

A: There's no doubt.

Q: Do you feel that your husband – could have acted in any other manner other than as he did to protect her life?

A: Absolutely not.

Q: Okay, do you think by this individual lunging at your husband, that he intended to attack your husband?

A: Yes I do.

Q: And do you think your husband's life would be in direct and imminent danger at that point?

A: Yes.

Q: Okay, can you describe this, the deceased suspect for me?

A: He's a black male, I, it was diff, you could tell he was young, I couldn't tell his age approximately. He had a, his hair was cropped close to his head. He was wearing a green plaidish type shirt and blue jeans that were real light in color. He had black sneakers on and he weighed, I was guessing about 6'2" and probably close, close to 200 pounds.

Q: Okay, as a nurse do you work in ER or on one of the floors?

A: I'm a nursing educator at Valley plus I work in the ER at UMC.

Q: Okay so you, do you think by, because of your nursing experience looking at him, that he may have been under the influence of something or, uh, that would make him act this aggressive or could you tell?

A: It, from my vantage point, I, I couldn't tell.

Q: Okay and about how long was it from hearing the screams until your husband confronted this suspect and tried to arrest him?

A: Gosh, minutes, it would be difficult to assess.

Q: Okay, Sgt. Albert is there anything you would like to ask Mrs. Sage?

CA: No, nothing to add.

Q: Lieutenant, is there anything you'd like to ask?

EJ: No sir.

Q: Okay with this, uh, we'll end this interview. The same persons present. The time is 0837 a.m.

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I HAVE READ THIS STATEMENT CONSISTING OF 6 PAGES AND AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT THE DETECTIVE BUREAU ON THE 21ST DAY OF MARCH, 1995 AT 0837 HOURS.

WITNESS: _____
WITNESS: _____

_____
SIGNATURE OF PERSON
GIVING STATEMENT

_____

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

EVENT 950321-0282

SPECIFIC CRIME OFFICER INVOLVED SHOOTING

DATE OCCURRED 03/21/95

TIME OCCURRED

LOCATION OF OCCURRENCE DENNIS WAY & EL CARTERO

CITY OF LAS VEGAS CLARK COUNTY

CAN YOU ID THE SUSPECT

NAME OF PERSON GIVING STATEMENT
JANICE COBIAN, 17 YEARS OF AGE
KARINA COBIAN, 18 YEARS OF AGE
LIZETH COBIAN, 13 YEARS OF AGE

DOB SOCIAL SECURITY NUMBER
RACE SEX
HEIGHT WEIGHT
HAIR EYES
WORK SCHEDULE DAYS OFF

RESIDENCE ADDRESS 4424 DENNIS WAY, LAS VEGAS, NV PHONE

BUSINESS ADDRESS PHONE

BEST PLACE TO CONTACT

BEST TIME TO CONTACT

DETAILS: The following is the transcription of a tape-recorded interview conducted by DETECTIVE D.

HATCH, P#540, LVMPD Homicide Detail, on 3-21-95 at 1800 hours. This a taped interview of JANICE COBIAN, KARINA COBIAN, and LIZETH COBIAN. This interview is in the presence of their mother, Esperanza Martin.

Q. Lizeth, did you see or hear anything earlier this morning, uh, in front of your residence?

A. Yeah. I heard her screaming and yelling and crying.

Q. Okay. And that was the lady across the street from your house?

A. Yes.

Q. Did you see the – your next door neighbor, the policeman, come out and confront the man or did you see any portion of the shooting?

A. No.

Q. Okay. You just heard her screaming and nothin' else?

A. Yes.

Q. Could you hear anything she was sayin' other than just screaming?

A. She was just yelling like, "get off me, get away from me".

Q. Okay. Could – Did you look out at all and see anything?

A. Not till after he shot him.

Q. Okay. Uh, Janice, can you tell me what you saw this morning?

A. Uh, I woke up when I heard a car door slam. And I heard some people running and I got out of my bed and they were already on the grass. And I saw him punch her three or four times on the head around the

face. And then she was yelling, "Get off me" or "Get away from me" and then I went back to sleep and I got up again when I heard the gunshots. And Merl, the police officer, was saying something to her and she said, "Oh, my god, you shot him" or something like that.

Q. Okay. Uh, Janice, did you hear anything she was sayin' other than, "Get off me", anything at all?

A. She said something like "Why are you doing this" or "Who are you?"

Q. Okay. And can you describe her?

A. Uh, kind of overweight. Uh, uh, reddish brown hair. Uh, that's about it.

Q. Okay. And can you describe the man that was punching on her and on top of her?

A. Uh, he was black. He was sorta skinny and, uh, he was – he looked kind of tall to me.

Q. Okay. When you heard the car door slam, did you see anyone other than those two people out there? Was anyone else around?

A. No.

Q. Could you hear what Merl, the next door neighbor, said to him or anything before the shooting?

A. No.

Q. Okay. So you only saw him attacking her? Did you see him pulling her clothes off or taking his clothes off?

A. I saw him trying to pull her – her top off.

Q. Okay. And did you see either one of 'em disrobe or anything?

A. No.

Q. Okay. So you heard the screams, looked out and saw him beating her, then you just – you roll over and go back to sleep and then hear the shots? How long later was that?

A. Uh, bout five or ten minutes.

Q. Okay. Did you think that he was attacking her or there was just a boyfriend, girlfriend fighting?

A. I thought it was just a boyfriend/girlfriend fighting.

Q. Okay. Karina, can you tell me what you saw and heard?

A. I didn't see anything. The only thing I heard was the gunshots and that's when I woke up my mom and dad and went – we went outside to see what was going on.

Q. Okay. How long have you all lived here?

A. About a year.

Q. Okay. And do you know the next door neighbor, uh, Merl?

A. Yes, we know him.

Q. and you're aware that he's a policeman?

A. Yes.

Q. Okay. Have you ever seen either of those – the two people that were out in the area before, any of you?

A. No, never.

Q. Okay. Is there anything any of you would like to add to this statement that might assist in our investigation of this crime?

A. No.

Q. Okay. We'll end this interview with the same persons present. Person conducting interview is Detective D. Hatch, Homicide Section, LVMPD.

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**I HAVE READ THIS STATEMENT CONSISTING OF 5 PAGES AND AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT 4424 DENNIS WAY, LAS VEGAS, NV. ON THE 21st DAY OF MARCH, 1995 AT _____ HOURS.**

WITNESS: _____

WITNESS: _____

_____
SIGNATURE OF PERSON GIVING STATEMENT

DH:lr
95D1611

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

EVENT 950321-0282

SPECIFIC CRIME OFFICER INVOLVED SHOOTING

DATE OCCURRED 03/21/95

TIME OCCURRED 0558 HOURS

LOCATION OF OCCURRENCE DENNIS WAY and EL CARTERO

CITY OF LAS VEGAS CLARK COUNTY

CAN YOU ID THE SUSPECT

NAME OF PERSON GIVING STATEMENT
CAROL JEAN EWING

DOB SOCIAL SECURITY NUMBER
RACE SEX
HEIGHT WEIGHT
HAIR EYES
WORK SCHEDULE DAYS OFF

RESIDENCE ADDRESS 4447 DENNIS WAY, LAS VEGAS, NV 89121
PHONE 435-1997

BUSINESS ADDRESS 2222 W. MESQUITE, LAS VEGAS, NV 89106
PHONE 382-5554

BEST PLACE TO CONTACT

BEST TIME TO CONTACT

DETAILS: The following is the transcription of a tape-recorded interview conducted by DETECTIVE J. MIKOLAINIS, P#1511, LVMPD Homicide Detail, on March 21, 1995 at 1737 hours.

Q. Ms. Ewing, are you aware that this interview is being tape recorded?

A. Yes, I am.

Q. Okay, knowing that it's being tape recorded, did something get your attention this morning, on the 21st of March, at approximately between the hours of 5:45 a.m. and 0600 a.m.?

A. Uh, yes. I was getting ready for work and my son came downstairs and said there were two boys outside fighting on the lawn. So I went outside and I opened the front door and there a, uh, I thought it was two boys on the front lawn. One had the other one down. And, uh, I watched for a few minutes and I was – I was thinking about calling Metro or hollering at him or doing something. And, uh, about that time, he – the guy that was on top, pulled his pants down and started having sex and I realized it was a woman, a white woman on the bottom. And, uh, I ran in here to call Metro and, uh, my boarder upstairs had already called. He was on the phone at the time. So I ran back outside again and about that time Merl, across the street, came running out and he said to them, uh, "What's goin' on here" or "stop what you're doin' " or whatever. And, uh, the black man jumped up and, uh, the white girl that was on the bottom, she was nude from the waist down and she ran towards him, saying that she had been raped. And the black man advanced towards Merl, and at that time he shot him twice.

Q. Okay. What happened after that?

A. Well, about that time the squad cars came up and there several of them immediately. I asked Merl, I said, "Do you want me to call Metro?" And he says, "No, they've already been notified."

Q. Okay. Going back to the very beginning when you said you noticed two people outside fighting, you thought they were boys, could you distinguish later that one was a female and one was a male?

A. Uh, yes. When they started having sex I could. She had a skirt on or something or – or I don't know what she had on to tell you the truth.

Q. Okay. The person that was a female, was she the one lying on the ground?

A. She was lying on the ground and he was on top of her, pinning her down, and they were having a discussion. At first it was real, real loud and then I couldn't exactly hear what they were saying, but, uh, it was just like she finally submitted – that she just finally gave up because he was just constantly at her. Talking at her. And pinning her down.

Q. Did you anybody hitting each other or slapping each other or anything like that?

A. No, at the time I watched 'em, I didn't see anybody hitting anybody.

Q. Okay. But you didn't hear any nois – uh, you said they were talking, did you – could you hear the conversation at all or hear – pick up any words at all?

A. No, I couldn't hear any words at all. I could just hear that they were really discussing, uh, very excitedly, uh, talking and he was – he had her down and, uh, uh, he went for his, uh – I could see the back of him. And I could see her legs and, uh, then I saw him take

his left hand and go around his shirt and I thought he was reaching in his pocket for a knife or something to – to kill this person that was on the ground. And that's when I ran in here and tried to call Metro and I couldn't get a – get a phone, so I ran back out there. And by that time he was – he was pulling his pants down. He had his pants off. And then I could see he was a black man cause he had his pants off clear down to his – his knees.

Q. Okay.

A. And I say the back of him completely.

Q. Okay. And after the girl got up and ran towards the other officer that was coming from across the street, did you hear her say anything?

A. I heard her hollering. She was very, very upset. And she was hollering about – I – I can't remember, but she said, "I'm being – being raped. He's – he's attacked me" or something to that effect. I – I just, you know, was so shocked by the whole thing, I just didn't really. But she ran towards him, you know, to get away from this black man.

Q. Okay. Did you ever – do you ever see these two people? Either the white female or the black man in this neighborhood before?

A. No, never.

Q. Never saw them before?

A. No, Huh uh.

Q. Okay. Is there anything else that you could add at this time?

A. No, I can't think of anything. I just was really shocked by the whole thing. I've never seen anything like that before.

Q. Okay. We'll end this interview. Same people present. Time is 5:45 p.m.

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**I HAVE READ THIS STATEMENT CONSISTING OF 5 PAGES AND AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT _____ ON THE 21ST DAY OF MARCH, 1995 AT 1737 HOURS.**

WITNESS: _____

WITNESS: _____

_____
SIGNATURE OF PERSON GIVING STATEMENT

JM:lr
95D1385

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT**
**VOLUNTARY STATEMENT**

Page 1 of 1

Event# 950321-0282

THIS PORTION TO BE COMPLETED BY OFFICER

Specific Crime Rape & Shooting
Date Occurred 3-21-95 Time Occurred 6:00
Location of Occurrence 4447 Dennis Way
[ ] City [X] County
Your Name (Last/First/Middle) Ewing Carol Jean
Date of Birth 12/17/38
Social Security # 507-44-52
Race W Sex F Height 5'3

Weight 120 Hair AubEyes Brown

Work Schdl. (Hours) 7:30-4:30

(Days Off) Sat & Sun Business/School

Zelzah Temple

Residence Address: (Number & Street)

4447 Dennis Way

Bldg./Apt.# City L.V.

State NV

Zip Code 89121Res. Phone: 435-1997

Bus. Phone: 382-5554 EXTBus. (Local) Address:

(Number & Street) 2222 W. Mesquite Ave

Bldg./Apt.# City L.V. State NV

Zip Code 87106 Occupation Office

Depart Date ___ Best place to contact you

during the day Work

Best time to contact you during the day Any Time

Can You Identify the Suspect? [ ] Y

[X] N

**DETAILS** I was awake getting ready for work & heard voices outside. My son came down and said there were 2 boys fighting outside – I opened the door and saw the black man on top of the other. They were arguing and then the black man took his pants down and she pulled hers down and they began having sex. My neighbor Merrill Sage came out and asked them what was going on. The black man jumped off and started towards Merrill – The girl was saying that she was being raped – The man wouldn't stop & Merrill fired twice at the man, hitting him.

They were on the ground arguing for about 5 minutes before the sex took place. He was holding her down by force.

HAVE READ THIS STATEMENT AND I AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT (LOCATION) 4447 Dennis Way ON THE 21st DAY OF March AT 6:20 (AM/PM), 1995.

Witness/Officer: /s/ S. Donovan
(SIGNATURE)

Witness/Officer: /s/ S. Donovan
(PRINTED)

/s/ X Carol Jean Ewing
SIGNATURE OF PERSON GIVING STATEMENT

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

EVENT 950321-0282

SPECIFIC CRIME OFFICER INVOLVED SHOOTING

DATE OCCURRED 03/21/95

TIME OCCURRED 0558 HOURS

LOCATION OF OCCURRENCE DENNIS WAY and EL CARTERO

CITY OF LAS VEGAS CLARK COUNTY

CAN YOU ID THE SUSPECT

NAME OF PERSON GIVING STATEMENT
BILLY MIZELL

DOB 6-5-43 SOCIAL SECURITY NUMBER 433-62-1529
RACE SEX
HEIGHT WEIGHT
HAIR EYES
WORK SCHEDULE DAYS OFF

RESIDENCE ADDRESS 4447 DENNIS WAY
LAS VEGAS, NV 89121
PHONE 435-1997

BUSINESS ADDRESS PHONE

BEST PLACE TO CONTACT

BEST TIME TO CONTACT

DETAILS: The following is the transcription of a tape-recorded interview conducted by DETECTIVE J. MIKOLAINIS, P#1511, LVMPD Homicide Detail, on March 21,

1995 at 6:55 p.m. This interview is in reference to a rape and officer involved shooting that took place at Dennis Way and El Cartero.

Q. Billy, are you aware that this interview is being tape recorded?

A. Yes, I am.

Q. Okay, knowing that it's being tape recorded, did something get your attention this morning at approximately quarter to six, six o'clock this morning?

A. Uh, yes it did.

Q. And what could that be?

A. It was loud talking outside. Sounded like an argument out front. Uh, it was around six o'clock this morning and I, uh, I got up to look out the front window – of my bedroom window – and, uh, I see two people that were in the lawn – layin' on the lawn next door and they appeared to be – I thought it was two teenagers just wrestling cause it didn't – it wasn't a really loud disturbance, really, I mean, all that loud. It wasn't screaming to it, but, uh, when I saw what they were doin', I just stood there watchin' them for a little bit and then I saw one – the person that seemed to be holding the other one down, drop his pants and then that's when I realized what was goin' on, so I dialed 9-1-1 immediately. And while I was talking to the dispatcher, I see a gentleman that lives across the street from it that I know is a policeman, he came out with a gun in his hand and I – I couldn't hear all the conversation completely, but I know he was tellin' the guy to get up and move back and something. And as he did, the guy pulled his pants up and stepped over on the sidewalk, which was three or four feet away, and then he started towards the policeman. He didn't lunge at him, but

he was moving towards him and the policeman fired twice and the guy fell down and never moved again. That was it. And at that time another – dispatch seemed to know this cause – well, I find out later the guy had a walkie – talkie out there, so he apparently was in communication with 'em himself, so. Soon as the gunshots fired well, they knew it and then a policeman came on a motorcycle just immediately. And I got off the phone and ran down and went out, too, and went up to the policeman and . . . I just went to make sure he was okay cause he looked like he was shaky. And the woman was sitting on the sidewalk there, then. I just observed that she was – her face had been beaten up. Uh, uh, basically, I just then just observed the guy on the sidewalk and, uh, the other policeman told me to – me and another gentleman that had walked up at this time that we probably should get back out of the way cause they were – they were fixin' to rope the stuff off and other policemen were arriving and that's, uh, basically, that was about it. Uh.

Q. Okay. Could you describe the suspect for me?

A. Uh, he was black and I – I would guess 6' 6" height. Uh, he had – I know he had jogging pants, like on sweat pants or jogging pants, whatever you call it. And some kind of sweat shirt or something. But I know they light colored jogging pants.

Q. What about the female?

A. She had, uh, as they were rollin' on the grass, I noticed that before I could see that her legs bare – before there was like a dark pair of jogging pants or something she had on. They were real dark. But at six o'clock in the morning, it was hard to tell cause it really wasn't real light yet so I really couldn't tell. But all of her clothing seemed to be dark.

Q. Okay. By chance did you happen to see the suspect striking the victim on the ground?

A. No. I never saw that. That, uh, as I watched all I could see was like, uh, him tryin' to keep her from getting up. Like, uh, like I said, I didn't know it was a her to start with. I thought it was two teenaged boys just wrestling. But, uh, the other person – there wasn't any loud screamin' to it, just, uh, like an argument.

Q. Okay. When you say you were watching out of your window, was that – is that on the first floor or the second floor?

A. Second floor. Upstairs.

Q. Okay. And were the – these people facing you? Were they sideways or was his back towards you?

A. I would – I would guess most of the time the guy's back was towards me, cause, uh, just – every time the other person would try to get up or somethin' he would just maneuver again over her to – so they couldn't get up.

Q. Okay. Was she, uh, appear to be, uh, screaming and yelling for help or anything like that? Or?

A. I – like I said, I didn't – I couldn't hear any screaming. I could hear conversation. Then – the only words I really made out were, uh, "why are doin' this" or somethin' like that. And I could have swore that I – I heard a name being called, but I mean, I could be mistaken. I thought a name was being said during this. But there was no loud screamin' to it. Just, "Why are you doin' this" and "stop" and – but I did hear the word "stop" and . . .

Q. When, uh, you saw the female sitting on the curb, uh, did you notice if she was bleeding or any marks or scars or anything on her face or arms or anything?

A. Her face was definitely bleeding. All around her mouth was bleeding and the rest of face looked bruised or not bruised, but reddish all over. But this was – all her mouth was all bleeding, so he must have busted both lips.

Q. Okay. Is there anything else that you could add at this time that would help us in our investigation?

A. Uh, no. Nothing I can think of off hand.

Q. Okay. We'll conclude this. Time is 6:56 p.m. Same people present.

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I HAVE READ THIS STATEMENT CONSISTING OF 6 PAGES AND AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT ___ ON THE 21st DAY OF MARCH, 1995 AT 1855 HOURS.

WITNESS: _____
WITNESS: _____

_____
SIGNATURE OF PERSON GIVING STATEMENT

JM:lr
95D1835A

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

Event # 950321-0282

THIS PORTION TO BE COMPLETED BY OFFICER

Specific Crime

Location of Occurrence

[ ] City
[ ] County

Date Occurred
3-21-95

Time Occurred
0555

Can You Identify [ ] Yes

the Suspect? [ ] No

Name (Last/First/Middle)
Mizell Billy H.

Date of Birth 6-5-43

Social Security # 433-62-152

| Race | Sex | Height |
|---|---|---|
| W | M | 5'9" |
| **Weight** | **Hair** | **Eyes** |
| 145 | B | B |

Work Schdl. (Hours)
8-4:30

(Days Off)
SS

Business/School

Residence Address: (Number & Street)
4447 Dennis Way

| Bldg./Apt.# | City | State | Zip Code |
|---|---|---|---|
| | Las Vegas | NV | 89121 |

Res. Phone: 435-1997

Bus. Phone:

Bus. (Local) Address: (Number & Street)

| Bldg./Apt.# | City | State | Zip Code |
|---|---|---|---|

Occupation
Construction

Depart Date (if visitor)

Best place to contact you during the day
Home

Best time to contact you during the day
After 5 p.m.

DETAILS I was awaken by a loud argument out front about 6:00 A.M. I looked out my upstairs bedroom window at two people that were rolling around on the lawn 2 doors over. I thought at the time it was 2 teenage boys, names were exchanged, then I saw one of them pull his pants down and climb on top of the other and I realized what was happening. I then called 911, while I was talking to dispatch. A man came out of his house across the street whom I knew to be a policeman. He had a gun in his hand and ordered the man off of the woman. At that time the man jumped up, pulled up his pants, stepped on the sidewalk and seemed to move at the policeman, who fired 2 times

at the suspect who fell to the walk and lay still.

I HAVE READ THIS STATEMENT AND I AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN, THIS STATEMENT WAS COMPLETED AT (LOCATION) 4447 Dennis Way

ON THE 20 DAY OF MARCH AT 0620 (AM/PM), 19 95.

Witness/Officer: S. Donovan
(SIGNATURE)

Witness/Officer: S. Donovan
(PRINTED)

/s/ Billy H. Mizell
SIGNATURE OF PERSON GIVING STATEMENT

[Exhibits Omitted In Printing]

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT**
**INTEROFFICE MEMORANDUM**

March 24, 1995

**TO:** FILE – EVENT 950321-0282

**SUBJECT:** OFFICER INVOLVED SHOOTING – DISPATCH TAPE

Dispatch: 911 Emergency 113

O/R: Yeah, this is Officer Sage. You got a 426 in progress, 4400 block of Dennis Way.

Dispatch: 4400 block of where?

O/R: Dennis Way.

Dispatch: Who do you work for?

O/R: Metro Traffic.

Dispatch: Okay, what's your P number?

O/R: 718

Dispatch: Okay, what do you see?

O/R: A black is raping a female across the street. I'm gonna [sic] pants on and go out there.

Dispatch: It's across . . . Is your address 4400 Dennis?

O/R: 40 . . . my address is 4665 El Cartero.

Dispatch: Spell your street name?

Mrs. Sage: I am his wife. I will give you the rest of the information please.

* * *

[p. 5] Mrs. Sage: Yeah, she has no clothes on. Uhm . . . and down on the ground. Lemme get her a blanket.

Dispatch: Okay, you can lay the phone down and g. . . .

Mrs. Sage: I have.. I have a portable, so. . . .

Dispatch: Okay. Okay, I'll stay with you.

Mrs. Sage: Uhm, my husband fired two shots.

Dispatch: Okay.

Mrs. Sage: I'm here sweetheart.

O/R: I had to do it.

Mrs. Sage: I know you did.

Dispatch: Okay, everybody's rolling so they should be there shortly. [Victim speaking/crying/sobbing unintelligible] Has he got a Metro officer with him, ma'am?

Mrs. Sage: Pardon me?

Dispatch: Is Metro there yet?

Mrs. Sage: Yes, Metro's here. Traffic's here.

Dispatch: Okay. Okay, I'm gonna go ahead and let you go so you can talk to the Metro officer there, alright?

Mrs. Sage: Okay.

Dispatch: Alrighty.

Mrs. Sage: Thanks, bye, bye.

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT**

**5/109.00 USE OF FORCE**
**26.1.1**

**5/109.01 USE OF FORCE**
**A.S. 1.2.6, 1.3.1, 1.3.2, 1.3.3, 1.3.4, 1.3.6, 1.3.7, 1.3.8, 1.3.9, 1.3.12, 22.2.5, 33.7.2, 55.2.6**

It is the policy of this department to accomplish the police mission as efficiently and unobtrusively as possible. The department has the highest regard for the dignity and liberty of all persons, and places minimal reliance upon the use of force and authority.

In vesting members with the lawful authority to use force for the public welfare, a careful balancing of all human interest is required. Department members shall use only that force that appears reasonably necessary to bring an incident under control, while protecting the lives of citizens or other department members. Any force used will be only to that degree minimally necessary to accomplish a lawful police task.

DEFINITIONS

| | |
|---|---|
| Deadly Force: | Any force likely to cause death or serious bodily injury. |
| Non-Deadly Force: | Any force other than that considered to be deadly force. |
| Reportable Force: | The use of any type of force that results in death, injury, or complaint of injury; any intentional traffic collision; and any discharge of a firearm outside the firing range, excluding off-duty situations such as hunting or |

| | |
|---|---|
| | participating in competitive shooting. |
| Reasonable Belief: | The facts or circumstances the member knows, or should know, are such as to cause an ordinary and prudent person to act or think in a similar way under similar circumstances. |
| Serious Bodily Injury: | A bodily injury that creates a substantial risk of death; causes serious, permanent disfigurement; or results in a long-term loss or impairment of the functioning of any bodily member or organ. |
| Probable Cause: | The facts and circumstances known to the department member that would warrant a prudent person to believe a crime has been committed and that the person accused did commit the crime. |
| Authorized Weapons: | Weapons meeting department specifications for which members receive proficiency and safety training. |
| Force Continuum: | Broad categories of force in identifiable, escalating stages of intensity. They are commonly identified as presence, dialogue, empty-hand/PR-24 control, chemical, temporary incapacitation, and deadly force. |

[Graphics Omitted In Printing]

PROCEDURE

AUTHORIZATION TO CARRY FIREARMS AND NON-DEADLY WEAPONS

Department members authorized to carry firearms and non-deadly weapons will be instructed in the policies described herein and provided with necessary training. New department members will be provided a copy of this order and thoroughly trained and tested for proficiency before being authorized to carry a firearm or non-deadly weapon.

Members authorized to carry firearms shall be armed while on duty, whether in uniform or civilian attire. Weapons and ammunition not having department authorization are expressly prohibited at all times.

The carrying of firearms while off duty shall be at the discretion of authorized members. Unarmed off-duty members are not subject to disciplinary measures for failure to take action, however, if the need for police services arises in their presence, the off-duty shall request an on-duty police officer to respond. The following personnel are prohibited from carrying firearms while off duty:

1. Probationary police and corrections officers who have not completed the police or corrections academy

2. Commissioned corrections personnel in uniform (Except those corrections officers authorized to carry weapons on duty)

3. Non-commissioned personnel armed by the department who have not completed firearms

training and probation in the classification that created the need to be armed

4. Members under suspension and those failing to qualify consistent with 5/108.14.

Off-duty members who anticipate consuming alcoholic beverages are advised not to carry a firearm. Any department member found intoxicated and carrying a weapon shall be subject to disciplinary action. If the need for police services arises while an off-duty member is consuming alcoholic beverages, the member shall request an on-duty police officer to respond.

Off-duty members using deadly force while exercising their police powers shall be subject to all provisions of this order and assigned to on-duty status.

## PARAMETERS FOR USE OF NON-DEADLY FORCE

When use of force is needed, department members should assess an incident to determine, based on training and experience, which options in the force continuum will best de-escalate the situation and bring it under control in a safe and prudent manner.

Members are permitted to use department-authorized non-deadly force techniques (including physical force) and equipment for resolution of incidents to:

1. Protect themselves or another from physical harm,
2. Restrain or subdue a resistant suspect, and
3. Bring an unlawful situation safely and effectively under control.

The PR-24 baton (including X and FX), K-9, aerosol defensive spray (oleoresin capsicum) Lateral Vascular Neck Restraint (L.V.N.R.) and stun and distract devices used by SWAT and other specialized units are the only authorized non-deadly weapons and tactics. The use of a flashlight as a non-deadly weapon is discouraged. Should it become necessary to use the flashlight for defensive purposes, it is to be used in the same manner as the PR-24. Members are to avoid striking suspects on the head, neck, sternum, spine, groin, or kidneys, unless confronted with a deadly force situation.

## PARAMETERS FOR USE OF DEADLY FORCE

Department members are not authorized to draw or display their firearms, except for training at the firearms range, unless the circumstances create reasonable belief that it may be necessary to use the firearm in conformance with this order. Before using a firearm, department members shall, whenever feasible, identify themselves and state their intention to shoot. Members are to fire their weapons only to stop and incapacitate an assailant from completing a potentially deadly act. Members should shoot at the "center body mass" for maximum stopping effectiveness and minimal danger to innocent bystanders.

The use of a vehicle in an intentional collision to stop or apprehend a suspect shall be considered a use of deadly force. Because collisions produce unpredictable movements of the vehicles involved, they create an immediate danger. Forcible stopping is not recommended and shall only be attempted as a last resort. Members initiating an

intentional collision may be held accountable for unintentional damage or injury to bystanders caused by the collision.

Department members are authorized to use deadly force to:

1. Protect themselves or others from what is reasonably believed to be an IMMEDIATE THREAT OF DEATH OR SERIOUS BODILY HARM;
2. Prevent the escape of a fleeing felon whom the member has probable cause to believe will pose AN IMMEDIATE THREAT To HUMAN LIFE if escape should occur;
3. Justifiably kill an animal
   a. In self-defense,
   b. To prevent substantial harm to the member or another, or
   c. When the animal is so badly injured and humanity requires its relief from further suffering; and
4. Qualify or practice with their firearm at the LVMPD Firearms Range.

Note: A seriously wounded or injured animal may be destroyed only after all attempts have been made to request assistance from the agency (Humane Society, animal control, game warden, etc.) responsible for the disposal of animals. The destruction of vicious animals follows the same rules set forth for self-defense and the defense and safety of others.

Department members are not authorized to discharge their firearm:

1. As warning shots;
2. If it appears likely that an innocent person may be injured;
3. From a moving vehicle, except as a last resort; or
4. At a moving vehicle, unless it is absolutely necessary to do so to protect against imminent threat to the life of the member or others. As such members,
    a. Shall attempt to move out of the path of an oncoming vehicle, if possible, rather than discharge their firearms.
    b. Shall not intentionally place themselves in the path of an oncoming vehicle and attempt to disable the vehicle by discharging their firearms; and
    c. Shall not discharge their firearms at a fleeing vehicle or its driver.

Members are to exercise reasonable care and caution in the safe handling of a firearm. A firearm can be considered "accidentally discharged" for the following reasons only:

1. Mechanical failure
2. Faulty ammunition
3. Unintentional discharge, not resulting from negligence

## REPORTING AND INVESTIGATIVE REQUIREMENTS

### Officer's Report on Use of Force

The department investigates all use of force incidents to determine their justification, as well as to correct any

identifiable training deficiencies. Members involved in use of force incidents will notify their supervisor immediately and complete an Officer's Report On Use Of Force, LVMPD 156. The report will be required by each member, officer or civilian, involved in a use of force incident when:

1. A firearm is discharged outside the firearm's range (excluding off-duty situations such as hunting or participating in competitive shooting);
2. The use of force results in death, injury, or complaint of injury;
3. A non-deadly weapon or tactic is used on a person; or
4. Other actions result in death or injury, including intentional traffic collisions.

Notification of Patrol Lieutenant

The patrol lieutenant, or if unavailable, the designated FSD watch commander is summoned to take control of the incident scene until relieved by investigative personnel when:

1. A firearm is discharged outside the LVMPD Range;
2. The use of force results in death or serious injury;
3. A citizen or arrestee complains that an injury has been inflicted as the result of a police activity.

Notifications by Communications

The patrol lieutenant, or if unavailable, the designated FSD watch commander ensures Communications has made the appropriate notifications. Communications shall immediately notify:

1. The member's immediate supervisor and the Criminalistics Bureau for non-injury or property damage incidents (The IAB on-call investigator and the Risk Manager will also be notified when a firearm is discharged at anything other than a person.);

OR

2. The Homicide Section (and General Assignment Detail during non-business hours) and medical assistance, followed promptly by notification of the member's immediate supervisor, the Criminalistics Bureau, Risk Manager, and PEAP officers for death and serious bodily injury incidents. (PEAP will be notified for any actions by a member where death could have resulted.)

The involved member is placed in relief of duty status by the immediate supervisor (completes LVMPD 117, Notice of Relief of Duty), for incidents involving death and serious bodily injury. The Homicide Section ensures the member's weapon is impounded by the Criminalistics Bureau and a loaner weapon is provided by the Homicide Section, if appropriate. The supervisor also notifies the division/office commander in writing regarding relief of duty and rearming the member. The identity of department members involved in deadly force incidents is not released to the public or media for 48 hours.

The Homicide Section investigates all deaths or serious injuries resulting from use of force (including in custody incidents) and intentional shooting incidents at human beings, and submits a written report of findings to the Sheriff. The deputy chief of ISD or the ranking Homicide Investigator (General Assignment Detail after business hours) present has command of the investigation,

IAB investigates the discharge of a firearm at anything other than a human being and submits a written report to the Sheriff.

PEAP ASSISTANCE

A PEAP officer responds to use of force incidents resulting in death or serious injury, or where death could have resulted. PEAP arranges for a psychological counseling of involved members by a department-approved psychologist, and forwards a recommendation concerning length of relief of duty and follow-up counseling to the Sheriff. PEAP also advises the appropriate division/office commander of the employee's readiness to return to duty. Normally, an employee will be returned to duty following a finding that the death was justifiable or excusable by a coroner's inquest.

PEAP also responds when a department member has suffered a line-of-duty death or serious injury, and:

1. Assists in notifying the families of members in a timely, personal manner;
2. Assists and supporting families at hospitals and funerals;
3. Helps families with legal and benefits matters,
4. Counsels families regarding finances and other possible problems;
5. Supports families during criminal proceedings (if any); and
6. Maintains long-term contact with families and keeps informed of needs.

## 5/109.02 USE OF FORCE REVIEW BOARD 1.3.7

It is the policy of the Sheriff to provide a process for the Department and community for the critical review of use of force incidents involving Department members. That process, the Use of Force Review Board, will be comprised of citizens of Clark County and members of this Department.

The Review Board will examine the individual member's actions, existing operational procedures, training, and supervision. It will be non-adversarial and will be closed to the public and non-involved Department members.

### DEFINITIONS

Case Investigator: The primary officer(s) assigned the responsibility to investigate the case under review.

Garrity Warning: An admonishment given to a Department member when requested to make remarks concerning involvement in an incident under administrative review. Garrity prohibits any remarks being used against the member in criminal proceedings.

### PROCEDURE

### INCIDENTS/ACTIONS WHICH MAY BE EXAMINED BY THE REVIEW BOARD

1. Incidents when a person is seriously injured or killed by a Department member using any type of force, except traffic accidents.

2. Actions by a member that could have resulted in death or injury.

3. Deliberate shootings by a member at another human being, regardless of injury or damage.

BOARD MEMBERS

The Use of Force Review Board shall consist of:

1. The Chairman, appointed by the Sheriff from the rank of Deputy Chief, serving as a non-voting member, with the Deputy Chief's Management Assistant serving as Secretary;

2. One (1) commissioned Department member from the rank of Captain, or above;

3. The Training Bureau Commander, with the IAB Commander serving as alternate;

4. One (1) peer member of the same classification of the member under review; and

5. Four (4) citizen members who reside in Clark County.

R. PAUL McCAULEY, Ph. D.
*Criminologist*
4620 Lucerne Road
Indiana, Pennsylvania 15701
Telephone:
(412) 349-9676

August 19, 1996

BY FAX 702 792-9647

Mr. Thomas Christensen
Attorney at Law
1000 S. Valley View Blvd.
Las Vegas, NV 89107

RE: Clara Palm vs. Las Vegas Metropolitan Police Department, et al.

COMMONWEALTH OF )
PENNSYLVANIA )
) SS
COUNTY OF INDIANA )

AFFIDAVIT

BEFORE ME, the undersigned authority, on this date personally appeared R. PAUL McCAULEY, Ph.D., who being duly sworn, deposes and says:

I reserve the right to amend this affidavit should additional information become available.

EXPERT QUALIFICATIONS

I am a Professor of Criminology and former Chairperson of the Department of Criminology, Indiana University of Pennsylvania (IUP). The University is a comprehensive, doctoral degree granting institution with an approximate

enrollment of 15,000 students. The Department of Criminology offers bachelors, masters and doctorate degrees and has about 1,000 criminology majors. I teach and conduct research at all academic/degree levels.

I am a former Pennsylvania municipal police officer and in that capacity I engaged in high speed pursuits and police vehicular approaches and maneuvers. I am certified by the Pennsylvania State Police as a police instructor. In my academic duties, as well as in my police training duties I teach the policies and procedures of police operations and pursuits. Also, I have written or published more than 80 professional papers, books, chapters and technical reports many of which address the issues concerning police pursuits, operations and policies.

For almost ten years I was a member of the faculty of the Southern Police Institute, School of Police Administration, University of Louisville. In that position I lectured to more than 1,500 police commanders from around the United States, including state and municipal command officers, in the area of police operational policy formulation, which included police pursuits and use of force. More than 300 of these student officers have become police chiefs. Also, I have received numerous letters and commendations from police executives, for my work and contributions to their agencies.

In 1987, I was a Fullbright Scholar, Australia. My lectures included university faculties in the schools of law, justice studies, business and to professional police commanders

and security directors. My lecture area was the relationship/interaction between public police and private security in the prevention of crime.

I am a Board Certified Forensic Examiner and Diplomat, American College of Forensic Examiners and have been qualified as a police expert in state and federal courts in more than 20 states. In 1984, I was one of two finalists interviewed for the position of Commissioner of the Pennsylvania State Police. The Pennsylvania State House of Representatives issued a formal citation recognizing my career and contributions to law enforcement.

## INTRODUCTION

I was retained by Attorney Thomas Christensen, to review the case material and render a professional opinion regarding the police operation which occurred on March 21, 1995, involving the above referenced parties. My retainer was paid in advance of my rendering any analysis or opinion and payment was not contingent upon my rendering a favorable opinion.

## MATERIALS REVIEWED

For the preparation of this affidavit, I have reviewed the following material. (Not listed in any order of importance.)

1. Copies of two police dispatch tapes regarding night of this incident.

2. Laser printed photocopies of all photographs pertaining to this case.

3. Defendants Las Vegas Metropolitan Police Department, Clark County, and Merl Sage's Federal Rules of Civil Procedure 26(f) production.
4. Plaintiff Complaint.
5. Answer to Complaint.
6. Plaintiff Interrogatories.
7. Plaintiff's initial document and witness exchange at 26(f) meeting.
8. Plaintiff's interrogatories to Defendant.
9. Plaintiff Clara Palm's Answers to interrogatories.
10. Amended Complaint.
11. Motion to Dismiss.
12. Plaintiff's Opposition to Motion to Dismiss.
13. Las Vegas Metropolitan Police Department's response to request to produce.
14. Las Vegas Metropolitan Police Department's answers to Plaintiff's interrogatories.
15. Reply to the opposition to the Motion to Dismiss.

OPINIONS AND RELEVANT COMMENTS

I shall offer the following preliminary responses to your question within a reasonable degree of professional certainty. I reserve the right to amend this affidavit as additional information is made available to me.

You asked if off-duty officer Merl Sage and the Las Vegas Metropolitan Police Department (LVMPD) violated

accepted police standards in responding to this felony in progress. I am unable to answer this question with the information I have available. In order to address this question I would need the following information;

1. The shooting sequence/order needs to be determined. Palm was shot twice. One entry wound was to the front of his body. A second entry wound was to the side/shoulder area and at a downward angle. If the frontal shot was the first shot in the officer's firing sequence, it would appear that Palm was facing the officer and would tend to support the officer's statement that Palm was approaching him. In such a situation the officer may have been justified in shooting an approaching Palm and that force may not have been excessive under these circumstances.

If the side/shoulder shot was the first shot in the officer's firing sequence, it would appear that Palm was not facing or approaching the officer but bent over and turning away. In such a situation the officer would not have been justified in shooting a non-threatening Palm and that force would have been excessive under these circumstances.

In order to understand these facts and formulate my opinions, I would need to hear the relevant trial testimony which reconstructs this incident generally and the shooting sequence, specifically.

2. The LVMPD policies, procedures, and training in the use of force; off-duty police officer operations, duties and responsibilities; and officer self-identification.

This information will assist me to determine what the written policies were in the LVMPD and their degree of conformity to accepted police standards. Trial testimony will assist me to determine the practices of the LVMPD and assess how/if the practices and customs of the LVMPD differ from the written policies and accepted police standards.

/s/ R. Paul McCauley
R. PAUL McCAULEY, Ph.D

SWORN TO AND SUBSCRIBED, BEFORE ME, this 19th day of August, 1996.

/s/ Gail L. McCauley

Notarial Seal
Gail L. McCauley, Notary Public
White Twp., Indiana County
My Commission Expires Oct. Illegible 1996
Member, Pennsylvania Association of Notaries

[SEAL]

WALTER R. CANNON
Nevada Bar No. 001515
BECKY J. BAKER, ESQ.
Nevada Bar No. 005208
RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX
301 East Clark Ave., #1000
Las Vegas, Nevada 89101
(702) 384-4012

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | |
|---|---|
| CLARA PALM, individually and as a surviving parent of ANTHONY ROBERT PALM, deceased,<br><br>Plaintiff,<br><br>vs.<br><br>LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a political subdivision of Clark County; CLARK COUNTY, a political subdivision of the State of Nevada; and MERL SAGE: and DOES I THROUGH V, inclusive,<br><br>Defendants. | CV-S-95-01283-LDG-(RJJ) |

## DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

(Filed Sept. 17, 1996)

COME NOW, Defendants, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, CLARK COUNTY and MERL SAGE, by and through their attorneys, RAWLINGS, OLSON, CANNON, GORMLEY & DESRUISSEAUX, hereby submit their Answer to Plaintiff's Amended Complaint as follows:

1. Answering Paragraphs I, II, III, IV, V, IX, X and XII of the First Claim for Relief of Plaintiff's Amended Complaint, Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein and upon said ground, deny each and every allegation contained therein.

2. Answering Paragraph VI of the First Claim for Relief of Plaintiff's Amended Complaint, Defendants deny that Plaintiff was confronted by Merl Sage. Defendants state that they do not have sufficient knowledge or information upon which to base a belief as to the truth or validity of the allegations contained therein and upon said ground, deny that Plaintiff was unarmed at the time. Further, Defendants further deny that Merl Sage without cause or provocation shot Plaintiff causing his death. As to the second paragraph of Paragraph VI of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

3. Answering Paragraphs VIII and XI of the First Claim for Relief of Plaintiff's Amended Complaint,

Defendants deny each and every allegation contained therein.

4. As to Paragraph I of the Second Claim for Relief of Plaintiff's Amended Complaint, these answering Defendants repeat and reallege their answers contained in Paragraphs I through XII of their Answer to Plaintiff's Amended Complaint as though fully set forth herein.

5. Answering Paragraphs II and III of the Second Claim for Relief of Plaintiff's Amended Complaint, Defendants deny each and every allegation contained therein.

## FIRST AFFIRMATIVE DEFENSE

These answering Defendants allege that the allegations contained in Plaintiff's Amended Complaint fail to state a cause of action against these Defendants upon which relief can be granted.

## SECOND AFFIRMATIVE DEFENSE

At all times mentioned in Plaintiff's Amended Complaint, these answering Defendants were government entities performing discretionary functions, and were therefore immune from civil liability for any damages which Plaintiff may allege arose from said conduct.

## THIRD AFFIRMATIVE DEFENSE

These answering Defendants allege that the damages, if any, alleged by Plaintiff were caused in whole or in

part, or were contributed to by reason of the negligence and intentional acts of Plaintiff or Plaintiff's decedent.

FOURTH AFFIRMATIVE DEFENSE

That the incidents referred to in the Amended Complaint, and resulting damages, if any, to Plaintiff were proximately caused or contributed to by Plaintiff or Plaintiff's decedent's own negligence or culpable conduct, and such negligence or culpable conduct was greater than the negligence, if any, of these answering Defendants.

FIFTH AFFIRMATIVE DEFENSE

That the acts complained of these answering Defendants were justified and privileged under the circumstances.

SIXTH AFFIRMATIVE DEFENSE

That at all times mentioned in Plaintiff's Amended Complaint, these answering Defendants were acting in a good faith belief that their actions were legally justifiable and they are entitled to a qualified immunity.

SEVENTH AFFIRMATIVE DEFENSE

These answering Defendants, at all times, had probable cause for the seizure, if any, of the Plaintiff's decedent.

## EIGHTH AFFIRMATIVE DEFENSE

That the arrest, detention and seizure of Plaintiff's decedent, if any, was completely justified under the circumstances and made pursuant to probable cause and reasonable cause in believing that Plaintiff's decedent was committing a criminal act.

## NINTH AFFIRMATIVE DEFENSE

That the arrest and detention of Plaintiff's decedent, if any, was pursuant to Plaintiff's decedent committing a criminal act.

## TENTH AFFIRMATIVE DEFENSE

That any damage suffered by Plaintiff's decedent was a direct and proximate result of his own misconduct and actions or the misconduct or actions of a third person.

## ELEVENTH AFFIRMATIVE DEFENSE

The conduct of these answering Defendants in exercising force, if any, was reasonable and permissible under the limits of State law, and its use was therefore privileged from any civil liability.

## TWELFTH AFFIRMATIVE DEFENSE

The use of force by the Defendants occurred because the officers involved reasonably believed that such force was necessary to protect themselves or others from death or great bodily harm.

THIRTEENTH AFFIRMATIVE DEFENSE

That the actions of the Defendants herein were privileged to the extent that they could use force, if any, reasonably necessary to respond to the situation with which they were confronted.

FOURTEENTH AFFIRMATIVE DEFENSE

These answering Defendants did not enact any policy, statute, ordinance or custom which denied Plaintiffs or Plaintiff's decedent their constitutional rights.

FIFTEENTH AFFIRMATIVE DEFENSE

No award for damages against these answering Defendants may exceed the provisions as set forth in NRS Chapter 41.

SIXTEENTH AFFIRMATIVE DEFENSE

The Las Vegas Metropolitan Police Department is immune from liability for punitive damages under 42 U.S.C. § 1983.

SEVENTEENTH AFFIRMATIVE DEFENSE

These answering Defendants are immune from liability under the provisions of State law, including, but not limited to NRS 41.032 and 451.0335.

EIGHTEENTH AFFIRMATIVE DEFENSE

These answering Defendants cannot be held liable under 42 U.S.C. § 1983 on a Respondent Superior Theory.

NINETEENTH AFFIRMATIVE DEFENSE

That to the extent Plaintiff's causes of actions against answering Defendants sound in negligence, that no recovery can be predicated upon 42 U.S.C. § 1983.

TWENTIETH AFFIRMATIVE DEFENSE

That the claims of Plaintiff based upon specific constitutional amendments do not state a cognizable claim upon which relief can be granted.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Any and all force actually used upon Plaintiff's decedent was caused and necessitated by the acts of Plaintiff's decedent committed upon these answering Defendants and was necessary and reasonable to protect these answering Defendants.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The actions of Officer Sage were privileged to the extent that he could use the force reasonably necessary to respond to the situation with which he was confronted.

## TWENTY-THIRD AFFIRMATIVE DEFENSE

These answering Defendants reasonably concluded that probable cause and/or exigent circumstances existed and are therefore entitled to qualified immunity from damages and suit for any of their actions or omissions to act in the circumstance at issue in Plaintiff's Amended Complaint.

## TWENTY-FOURTH AFFIRMATIVE DEFENSE

Any arrest and detention of Plaintiff's decedent was pursuant to probable cause, reasonable cause, and exigent circumstances to believe that Plaintiff's decedent was committing a criminal act or was himself in danger from physical or mental injury or a criminal act.

## TWENTY-FIFTH AFFIRMATIVE DEFENSE

As pursuant to Federal Rule of Civil Procedure 11, as amended, these answering Defendants reserve the right to amend their Answer to Plaintiff's Amended Complaint to add additional affirmative defenses, should subsequent investigation warrant.

Demand is hereby made by Defendants for trial by jury in the above-entitled action.

WHEREFORE, Defendants pray that the Plaintiff take nothing by reason of her Amended Complaint on file herein, and that they recover from Plaintiff a reasonable attorney's fee, their costs and disbursements in this action, and for such other and further relief as the Court may deem proper.

Dated this 17th day of September, 1996.

Respectfully submitted,

RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX

By /s/ Becky Baker
WALTER R. CANNON, ESQ.
BECKY J. BAKER, ESQ.
301 East Clark Ave., #1000
Las Vegas, Nevada 89101
Attorneys for Defendants

**CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that I am an employee of RAWLINGS, OLSON, CANNON, GORMLEY & DESRUISSEAUX; that service of the foregoing DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT was made on the 17th day of September, 1996, by depositing a true copy of same in a sealed envelope, postage prepaid, in the United States Mail, at Las Vegas, Nevada, addressed as follows:

THOMAS CHRISTENSEN
Christensen Law Offices, Chtd.
1000 South Valley View Boulevard
Las Vegas, Nevada 89107
Attorneys for Plaintiff

/s/ Dez Blea
An Employer of
RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX